(33,581)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 272

W. A. MARSHALL & CO., INC., PETITIONER,

vs.

STEAMSHIP "PRESIDENT ARTHUR," HER ENGINES, BOILERS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from the district court of the United States, Southern New York	1	1
Statement	1	1
Libel	2	1
Amended answer	5	3
Case	10	6
Appearances of counsel	10	6
Testimony of C. W. Sanford	10	6
Libellant's Exhibit 1—Contract between W. A. Marshall & Co. and American Palestine Line, Inc., dated February 18, 1925	20	14
Libellant's Exhibit 2—Letter from American Palestine Line, Inc., to W. A. Marshall & Co., dated February 19, 1925	22	16
Libellant's Exhibit 3—Contract between W. A. Marshall & Co. and American Palestine Line, Inc., dated March 4, 1925	23	16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 7, 1928

	Original	Print
Libellant's Exhibit 4—Letter from American Palestine Line, Inc., to W. A. Marshall & Co., dated March 4, 1925	25	18
Claimant's Exhibit A—Letter from W. A. Marshall & Co. to American Palestine Line, Inc., dated February 16, 1925	26	18
Claimant's Exhibit B—Trade acceptance, dated March 6, 1925	27	19
Claimant's Exhibit C—Affidavit of C. W. Sanford, dated October 2, 1925	28	20
Claimant's Exhibit D—Affidavit of George W. Hinckley, dated October 15, 1925	33	23
Opinion, Thacher, J	35	25
Final decree	38a	27
Notice of appeal	39	28
Assignments of error	40	28
Stipulation re transcript of record	42	29
Clerk's certificate (omitted in printing)	43	
Proceedings in the United States circuit court of appeals, second circuit	44	30
Opinion, Manton, J	44	30
Dissenting opinion, Hand, J	47	34
Decree	49	37
Clerk's certificate (omitted in printing)	50	
Order allowing certiorari	51	38

[fols. a & 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

W. A. Marshall & Co., Inc., Libellant-Appellant,

against

Steamship "President Arthur," Her Engines, Boilers, etc., Claimant-Appellee

Statement

1925.

May 11. Libel filed. S. S. "President Arthur" arrested.

June 13. Answer filed.

1926.

May 6. Order entered substituting Lampke & Stein for Krieger, Stutsky, Rush & Friedman as proctors for claimant.

Sept. 14. Amended answer filed.

1927.

June 3. Trial before Thacher, J.

Sept. 13. Opinion rendered directing dismissal of libel.

Oct. 10. Final decree entered dismissing libel.

Nov. 19. Notice of Appeal, Assignment of Errors and Bond filed.

[fol. 2] In United States District Court

Libel

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel of W. A. Marshall & Co., Inc., against the Steamship "President Arthur," her engines, boilers, etc., in a cause of contract, civil and maritime, alleges upon information and belief and respectfully shows to this Honorable Court as follows:

First. At all times hereinafter mentioned libellant was and still is a corporation organized and existing under and

by virtue of the laws of the State of New York, having an office and place of business at 17 Battery Place, in the Borough of Manhattan, City, County and State of New York, and engaged in the business of supplying coal.

Second. The Steamship "President Arthur" is now within this district and within the jurisdiction of this Honorable Court.

Third. During the month of March, 1925, at the port of New York, libelant, upon the request of the owner of the Steamship "President Arthur," or a person authorized by the owner thereof, furnished to and for the use of said steamship about 4,150 tons of bunker coal at an agreed price of $21,173.16, which price was the reasonable market price for said coal. The said coal was necessary to enable the steamship to perform her intended voyage.

Fourth. The owner of the steamship "President Arthur" paid to libellant the sum of $11,790.54 on account of the pur- [fol. 3] chase of said coal, but has failed to pay the balance thereof, and by reason of the premises there is now due and owing to the libelant from the said Steamship "President Arthur" the sum of $9,382.62, no part of which has been paid, although the same has been duly demanded, and the libelant has a lien therefor under and by virtue of the Act of Congress known as the Merchant Marine Act, approved June 5, 1920, and also under and by virtue of the General Maritime Law.

Fifth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelant prays that process in due form of law may issue against said Steamship "President Arthur," her engines, boilers, tackle, apparel and furniture, and that all persons having or claiming to have any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this court will be pleased to award to the libelant its damages aforesaid with interest and costs, and that the said Steamship "President Arthur," her engines, boilers, tackle, apparel and furniture may be condemned and sold to pay the same, and that libelant may

have such other and further relief in the premises as it may be entitled to receive.

George W. Hinckley, Proctor for Libelant. Office and Post Office address: B-10 Produce Exchange Building, New York City.

[fol. 4] *Duly sworn to by Wilbur A. Marshall. Jurat omitted in printing.*

[fol. 5] In United States District Court

Amended Answer

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of American Palestine Line, Inc., the claimant of the Steamship "President Arthur," to the libel and complaint of W. A. Marshall & Co., Inc., in an alleged cause of contract, civil and maritime, respectfully shows:

First. Admits the allegations in Paragraph First and Second of the libel.

Second. On information and belief admits that in and during the month of March, 1925, the libellant furnished to and for the use of the Steamship "President Arthur," bunker coal, which coal was necessary to enable the Steamship to perform her intended voyage, but except as thus admitted, denies each and every allegation in paragraph marked "3" in said libel contained.

Third. On information and belief admits that the claimant paid to libellant the sum of $11,794.54, but except as thus admitted, denies the balance of the allegations in said paragraph contained and expressly alleges that the entire purchase price of the said coal was paid to the libellant by claimant by the delivery to it of two trade acceptances endorsed by third parties required by the contract to be given as complete payment for the said coal and upon the delivery of said trade acceptances all claims of plaintiff were paid and extinguished and any maritime lien had or claimed to be had by plaintiff was thereupon extinguished and terminated.

Fourth. Admits the jurisdiction of the United States and of this Honorable Court, but denies the remaining allega-
[fol. 6] tions in paragraph of the libel numbered Fifth.

Fifth. Further answering and by way of set-off, the claimant alleges, on information and belief, that heretofore on or about the 18th day of February, 1925, and the 4th day of March, 1925, the libellant and claimant entered into two separate agreements in writing for the purchase by claimant of approximately 4,225 gross tons of bituminous coal to be used as bunker fuel for the Steamship "President Arthur." And it was further, as a part of said written contracts, expressly warranted by libellant that said coal should be approximately 50% Bethel coal and 50% Melcroft coal, and further expressly warranted in writing as follows:

Bethel

"Bethel is Miller Vein coal having the usual characteristics of this seam in the South Fork and Scalp Level districts, which it adjoins.

The seam is absolutely clean, being free from any sign of slate or bone partings. Bethel is deep mined, contains no stained or crop coal and is excellent in appearance. It is soft by nature and does not run lumpy.

The coal analyzes as shipped approximately 16% Volatile, 76.25% fixed carbon, 6.75% Ash, 1.85% Sulphur, 14,750 B. T. U.'s and 2350° Fusing Temperature of Ash.

Bethel is regarded as a fancy grade of smokeless steam coal because of its low volatile and ash content and high heating value. It is an extremely hot coal and is unexcelled as a steam producer. It makes little or no smoke and
[fol. 7] comes within all smoke ordinance requirements."

Melcroft

"Producing Miller vein coal of unusual quality, cleanliness and uniformity. The seam being clean, carrying no parting of slate or bone, assures uniform quality at all times.

The coal analyzes as shipped, approximately 25.00% of volatile, 8.50% ash, 1.75% Sulphur, 14,300 B. T. U.'s and 2,500° Fusing Temperature of Ash.

The Volatile matter at 25.00% makes a quick, hot fire enabling a plant to meet sudden loads and hold the steam under excessive conditions. Yet the volatile is not sufficiently high to cause consumption to be high or cause complaint from smoke. It is unsurpassed for bunker fuel.

The sulphur being free from iron, this coal can be forced under any condition without causing clinker trouble.

In over a year not one report of clinker has been received; on the contrary the comment has been frequently made on its freedom from clinker. This experience is from over 100,000 tons handled in the past twelve months."

Sixth. Upon information and belief that the coal actually furnished "President Arthur" did not analyze as aforesaid, but on the contrary showed a much higher percentage of volatile, a much lower percentage of fixed carbon and a much higher percentage of ash and sulphur, and a very much lower number of British Thermal Units, which rendered said coal different from the coal warranted, and required a much larger consumption of tons of coal per day, [fol. 8] making it necessary for the claimant to purchase additional coal, all to its damage in the sum of Ten thousand ($10,000.00) Dollars, and claimant asks that this sum be offset against any sum which may be found to be due libellant.

Seventh. Further answering, claimant states on information and belief that heretofore and on or about the 18th day of June, 1925, the libellant had in its possession a certain trade acceptance provided in said contract to be delivered to it in payment for the balance of said coal and in the same amount as that mentioned in the libel and for which amount libellant seeks recovery. Said trade acceptance being endorsed as provided for in said contract by J. W. Gottlieb, Jacob Wacht and Jacob S. Strahl, the said libellant then and there elected to treat the said trade acceptance as payment of the sums due it for said coal and on that day, commenced an action to recover thereon in the Supreme Court, New York County, against the said J. W. Gottlieb, Jacob Wacht and Jacob S. Strahl, which action is still pending and undetermined, and claimant alleges that any maritime lien which the libellant had or could have had

was extinguished or suspended during the pendency of said action.

All and singular the premises are true.

Wherefore respondent prays that the libel may be dismissed with costs and for such other and further relief as may be just.

Lampke & Stein, Proctors for Respondent. Office and Post Office address: No. 29 Broadway, Borough of Manhattan, City of New York.

[fol. 9] *Duly sworn to by Joseph K. Guerin. Jurat omitted in printing.*

(NOTE.—The amended answer as filed pursuant to stipulation was not verified.)

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Hon. Thos. D. Thacher, District Judge

Case

New York, June 3, 1927.

APPEARANCES OF COUNSEL.

George W. Hinckley, for Libellant;
Chauncey E. Treadwell, for Respondent.

The claims of the libel and answer are stated.

C. W. SANFORD, being duly sworn and examined as a witness for the libellant, testifies:

Direct examination by Mr. Hinckley:

Q. In the month of February, 1925, by whom were you employed?

A. W. A. Marshall & Company.

Q. In what capacity?

A. As tide water sales manager.

Q. And in connection with your employment did you negotiate any contracts of sale between W. A. Marshall & Company and the American-Palestine Line as owner of the [fol. 11] steamer "President Arthur"?

A. I did.

Q. I hand you this contract and ask you if this was one of the contracts that you negotiated?

A. It was, yes.

Q. You saw this contract signed by the Treasurer of the American-Palestine Line?

A. Yes.

It is offered in evidence and marked Libellant's Exhibit 1 of this date.

Q. I want to call your attention to one paragraph in this contract. "The coal is not to be dumped from the railroad cars into barges until the seller receives written notice from the buyer either that it waives its right to analyze the coal, or has analyzed it and found it satisfactory and directs its dumping." That provision was arranged between you and pursuant to authority was this letter sent to you by the American-Palestine Line (showing witness paper)?

A. Yes, it was.

The letter is offered in evidence, dated Feb. 19, 1925, to Marshall, and marked Libellant's Exhibit 2 of this date.

Q. Subsequently to this contract of February 18, Libellant's Exhibit 1, was a further contract negotiated between you and the American-Palestine Line?

A. Yes, sir.

Q. I hand you a paper and ask you if that is that contract?

A. Yes, sir.

It is offered in evidence and marked Libellant's Exhibit 3 of this date, letter dated March 4, 1925, to the American-Palestine Line.

[fol. 12] Q. And at the time that contract was signed was that letter signed by Epstein as General Manager of the American-Palestine Line delivered to you?

A. Yes, sir.

The letter last referred to, dated March 4, 1925, to Marshall, is offered in evidence and marked Libellant's Exhibit 4 of this date.

Q. Pursuant to those contracts did W. A. Marshall & Company actually deliver the coal to the steamship "President Arthur"?

A. They did.

Q. I hand you herewith certificate of weight and origin of coal, and ask if the coal as outlined in that certificate of weight and origin was actually delivered to the "President Arthur"?

A. It was.

Q. What was that weight?

A. 4,151 tons and 12 cwt.

Q. And these are the bills of lading of those barges?

A. Yes.

The railroad receipts are offered in evidence and marked Libellant's Exhibit 5 of this date.

The bills of lading of the barges are offered in evidence and marked Libellant's Exhibit 6 of this date.

Q. Do you know when the last of the coal was delivered alongside the "President Arthur," within a day or so?

A. About March 6th.

Q. And what year was that?

A. That was 1925.

Mr. Hinckley: Mr. Treadwell, will you concede that the origin of the coal is as stated in these railroad certificates? [fol. 13] Mr. Treadwell: I won't make any specific concession because I don't know.

A stipulation is read into the record as follows:

Claimant consents that the railroad bills of lading and the certificates showing daily shipments of coal in question may be received in evidence as prima facie proof of the statements in the bills of lading.

Q. I hand you herewith some papers that purport to be the daily report of daily shipments from the Maple Ridge Coal Company and ask if they show shipments of coal delivered to the "President Arthur"?

A. They do.

Q. Are the cars that are checked in lead pencil by number the cars on which that coal came?

A. Yes.

Q. And is the number 3 as designated on those slips Bethel coal?

A. Yes.

The slips are offered in evidence and marked Libellant's Exhibit 7 of this date.

Q. I hand you certificate from Melcroft Coal certifying coal by car numbers, and ask you if those numbers are the numbers of the cars that were dumped into the lighters alongside of the "President Arthur."

A. They are.

The certificates are offered in evidence and marked Libellant's Exhibit 8 of this date.

Q. Mr. Sanford, when you first entered negotiations for the sale of this coal to the American-Palestine Line, what was said about the time the coal should be paid for?

[fol. 14] A. As I recollect it they wanted to pay for this coal in thirty days, and—no, our terms were thirty days, and they wanted a longer period; naturally I had to put that up to our Credit Department, and by their wanting a longer period than thirty days they looked further into their financial standing and came to the conclusion that they didn't like the account and wanted to get trade acceptances in order to get the money at any time that they wanted—in fact to discount that paper. When that question came up we wanted additional security, as we weren't satisfied with the credit of the American-Palestine Line.

Q. The purpose in getting these trade acceptances was, was it not, so that Marshall & Company by the use of these trade acceptances could obtain the benefit of the financing prior to the deferred time of payment arranged in the contract?

Objected to.

Objection sustained.

Q. Did you or did you not know that where bunker coal is supplied to a ship on the order of the owner that the

supplier has a lien against the ship for the value of such coal?

Objected to.
Objection sustained.
Exception.

After argument, the court says he will take the testimony but will disregard it.

Q. I will repeat the question: Were you or were you not of the opinion that you had a maritime lien for the supplying of coal ordered by the owner for the bunkers of a vessel?

A. Yes.

[fol. 15] Q. Is it or is it not a usual custom in the coal business, where time of payment is deferred, for the seller to draw upon the buyer and for the buyer to accept the draft and return it to the seller at some deferred time?

Objected to.
Objection sustained.
Exception.

Q. Is it or is it not the custom in the coal trade when supplying bunkers for steamers and there is to be a deferred date of payment, for the seller to receive a draft which it in turn discounts at the bank prior to the date of payment?

Objected to.
Objection sustained.
Exception.

Q. Was the requirement made by W. A. Marshall & Company that this draft should be endorsed by the parties named in the contract for the purpose of making the draft more negotiable at the bank?

Same objection.

The Court: I will assume it was so and let it stand.

A. It was.

Q. Was anything ever said during the time of the negotiations for this contract, or at the signing, as to the

abandonment of any lien or claim that Marshall & Company might have against a ship for supply of bunkers?

A. No.

[fol. 16] Cross-examined by Mr. Treadwell:

Q. You wrote this letter, which I produce, on the paper of your attorney Mr. Hinckley, February 16, 1925, did you not, Mr. Sanford?

A. Yes, I wrote that letter.

It is offered in evidence.

Marked Claimant's Exhibit A of this date.

Q. In that letter you said that the drafts must be endorsed by responsible persons acceptable to you, did you not?

A. Yes, sir.

Q. Who were those persons?

A. A party by the name of Wacht, one by the name of Gottlieb, and Jacob S. Strahl.

Q. And they were acceptable to you?

A. They were acceptable to me.

Q. You had them investigated?

A. As far as I know we did; that comes under our Credit Department; that I know, they were acceptable anyway.

Q. I show you a draft produced by your proctor, dated March 6, 1925; is that the draft for the amount of which you are bringing suit here?

Objected to; the papers speak for themselves.

The Court: He may identify it with the transaction.

A. Yes, that is it.

Q. That is the second draft mentioned in these contracts?

A. Yes, sir.

Q. And the first draft was paid?

A. Yes, sir.

Q. And the second draft was given——

A. It was a trade acceptance.

[fol. 17] The paper referred to is offered in evidence and marked Claimant's Exhibit B of this date.

Q. You also made an affidavit?

A. Our attorney, Mr. Hinckley, just mentioned that a moment ago, didn't he?

Q. Do you remember making an affidavit?

A. No, I don't remember it.

Q. I will show it to you. It is on the office paper of your proctor here (showing witness paper).

A. Yes.

Q. You remember it now?

A. Yes.

Q. And when you swore to it you believed it to be true?

A. Yes.

The affidavit referred to is offered in evidence and marked Claimant's Exhibit C of this date.

Q. You said in that affidavit—I quote here the following sentence from that letter—that is the letter I showed you before—that the court may observe one of the essential terms in the offer—and then you quote the part of the letter about the trade acceptances, and then you say "these trade acceptances to be endorsed by responsible persons acceptable to us." Now, you did believe that was an essential term of the contract, that the trade acceptances should be endorsed by responsible persons?

A. We did that for an additional protection; we didn't believe that the American-Palestine Line was financially responsible, and we insisted upon those endorsements on there so that we could discount that paper in case we needed to at any time.

[fol. 18] Q. Well, you did discount it, didn't you?

A. I don't think so.

Q. You don't?

A. No.

Q. And you brought a suit against these endorsers?

A. Yes, sir.

Q. And you made this affidavit in that suit?

A. I don't know just when that affidavit was made; Mr. Hinckley can tell you that.

Mr. Hinckley: The fact is conceded and it is also conceded that the action is pending and undetermined.

Mr. Treadwell: Yes. I offer in evidence affidavit of George W. Hinckley, proctor for the libellant, in the same set of papers. It is expressly stated in the affidavit that payment was to be made by these endorsers, that they would never have made the contract if the endorsements had not been there, and that they were not accommodation endorsers as claimed by the defendant in that action, but that the endorsements were accepted as payment of the obligation. It is stated in so many words.

Mr. Hinckley: Objected to; not that I deny that I made the affidavit, but admissions that I might make as attorney in another action I don't think can be binding as an admission of the plaintiff as to what he did in this action.

The Court: I will receive it—it is taken subject to the objection.

The affidavit referred to is offered in evidence and marked Claimant's Exhibit D of this date.

[fol. 19] By Mr. Hinckley:

Q. The purpose in securing these endorsers to these drafts was in order that you might negotiate it through a bank more readily than if you did not have it?

A. Yes, we couldn't negotiate the American-Palestine Line's notes.

Q. So that if necessary you might be in funds prior to the day ultimately stated for payment?

A. Yes.

Q. And that was the sole purpose of having this draft endorsed, was it not?

Objected to.

Objection overruled.

A. Yes, sir.

Q. What was the value of coal as delivered under the contract?

A. In dollars?

Q. Yes—how many tons and the rate and the amount?

A. 4151 tons and 12 cwt.; the price was $5.10 alongside their vessels; the amount was $21,736.16.

Q. And how much of that has been paid?

A. There has $21,173.16 been paid—leaving a balance of $9,382.62.

Q. Do you wish to correct the amount that has been paid? I think you stated it as the total amount of the bill; do you wish to correct it?

A. I wish to correct it.

Q. What was the amount paid?

A. The amount actually paid was $11,790.50; the full amount of the bill was $21,173.16; the balance due is $9,382.62.

Q. Interest would be from what date; what was the time of the last delivery?

A. The time of the last delivery was March 6, 1925.

Both sides rest.

[fol. 20] LIBELLANT'S EXHIBIT 1

Contract of February 18, 1925

Agreement made at The City of New York, in the State of New York, this eighteenth day of February, 1925, whereby W. A. Marshall & Company, a New York Corporation, with its principal place of business in The City of New York, hereinafter called the Seller, agrees to sell, and American Palestine Line, Inc., a corporation organized under the laws of the State of New York, with its principal place of business in the Borough of Manhattan, in The City of New York, State of New York, as owner of the S/S President Arthur, hereinafter called the Buyer, agrees to buy approximately thirty-six hundred and fifty (3650) gross tons of bituminous coal to be used as bunker fuel for the said S/S President Arthur.

O. K. The coal to be from the Melcroft and Bethel
C. W. S Mines located at Melcroft, Pa., and Holsopple,
O. K. Pa., respectively, approximately fifty per cent.
J. W. G. (50%) of each grade of coal, as per attached circulars.

The Buyer shall have the right, if it so selects, to take samples of the coal while in the railroad cars at Pier Eighteen, Jersey City, N. J. The coal is not to be dumped from the railroad cars into barges until the Seller receives written notice from the Buyer either that it waives its right to

analyze the coal, or has analyzed it and found it satisfactory and directs its dumping.

It is understood that no question as to quality can be raised by the Buyer after the coal has been dumped into barges.

O. K. C. W. S. O. K. J. W. G. The price of the coal is $5.10 a gross ton alongside the said S/S President Arthur, either at Morse's Drydock, Brooklyn, or Pier No. 39 North River, New York City at the option of the Buyer. Delivery [to commence]* [fol. 21] Feby. 20/25 or Feby. 23/25 [and to be completed within]* at option of buyer.

The Buyer will pay for the said coal as follows:

(1) By delivering to the Seller a trade acceptance drawn by it in favor of the Seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.

(2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal, harbor barge freight and insurance on coal while in barges, which acceptance is also to be endorsed by the said Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.

O. K. C. W. S. O. K. J. W. G. The entire contract between the parties is stated above and there is no outside condition, warranty, agreement or understanding. Certificate of weights according to R. R. bill of lading.

Witness the signatures of the respective parties hereto.

W. A. Marshall & Company, by W. A. Marshall, President. American Palestine Line, Inc., by J. W. Gottlieb, Secy.

[fol. 22] In consideration of the execution of the foregoing contract, and of the delivery of said coal by the

[*Words and figures enclosed in brackets erased in copy.]

Seller to the Buyer, and in consideration of One Dollar ($1.00) paid to each of the undersigned, the receipt of which is hereby acknowledged, we jointly and severally agree to endorse the said trade acceptances described in the foregoing contract between the Seller and the Buyer.

Dated, February 18, 1925.

Jacob S. Strahl, J. W. Gottlieb, Jacob Wacht.

LIBELLANT'S EXHIBIT 2

Letter Head of American Palestine Line, Inc.

New York, N. Y., February 19, 1925.

W. A. Marshall & Company, 25 Beaver Street, New York City.

GENTLEMEN: We refer to our Contract dated February 18, 1925, for the supply of coal aboard the S. S. President Arthur.

This coal is to be delivered alongside the S. S. President Arthur, at Morse Dry Dock & Repair Co., Foot of 56th Street, Brooklyn, N. Y., beginning in the morning, February 20th, 1925, and is to be continually delivered as speedily as possible so as not to hold up the stevedoring thereof. [fol. 23] We waive our right to analyze the coal.

Very truly yours, American Palestine Line, Inc. H. Epstein, General Manager.

he-ra.

LIBELLANT'S EXHIBIT 3

Contract of March 4, 1925

Agreement made at the City of New York, in the State of New York this fourth day of March, 1925, whereby W. A. Marshall & Company, a New York Corporation, with its principal place of business in the City of New York, hereinafter called the Seller, agrees to sell, and American Palestine Line, Inc., a corporation organized under the laws of the State of New York, with its principal place of

business in the Borough of Manhattan, in the City of New York, State of New York, as Owner of the S. S. President Arthur, hereinafter called the Buyer, agrees to buy approximately five hundred and seventy five (575) gross tons of Bituminous Coal to be used as bunker fuel for the said S. S. President Arthur.

The coal is to be from the Melcroft Mine, located at Melcroft, Pa.

The Buyer shall have the right, if it so elects, to take samples of the coal while in the railroad cars at Pier Eighteen, Jersey City, N. J. The coal is not to be dumped from the railroad cars into the barges until the Seller receives written notice from the Buyer either that it waives its right to analyze the coal, or has analyzed it and found it satisfactory and directs its dumping.

[fol. 24] It is understood that no question as to quality can be raised by the Buyer after the coal has been dumped into barges.

The price of the coal is $5.10 a gross ton alongside the said S. S. President Arthur at Pier No. 39, North River, New York City, delivery beginning tomorrow, March 5, 1925.

The Buyer shall pay for the said coal as follows:

(1) By delivering to the Seller a trade acceptance drawn by it in favor of the Seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.

(2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal harbor barge freight and insurance on coal while in barges, which acceptance is also to be endorsed by the said Jacob Wacht, Jacob S. Stahl and Joseph W. Gottlieb.

The entire contract between the parties is stated above and there is no outside condition, warranty, agreement or understanding. Certificate of weights according to railroad bill of lading.

Witness the signatures of the respective parties hereto.

W. A. Marshall & Company, by W. A. Marshall, President. American Palestine Line, Inc., by J. W. Gottlieb.

[fol. 25] In consideration of the execution of the foregoing contract, and of the delivery of said coal by the Seller to the Buyer, and in consideration of One Dollar ($1.00) paid to each of the undersigned, the receipt of which is hereby acknowledged, we jointly and severally agree to endorse the said trade acceptance described in the foregoing contract between the Seller and the Buyer, dated March 4, 1925.

J. W. Gottlieb, Jacob Wacht, Jacob S. Strahl.

Dated, March 4, 1925.

Libellant's Exhibit 4.

Letterhead of W. A. Marshall & Company

March 4, 1925.

W. A. Marshall & Co., 17 Battery Place, New York City.

Gentlemen: We refer to our contract dated March 4, 1925, for the supply of coal aboard the S. S. President Arthur.

This coal is to be delivered alongside the S. S. President Arthur at Pier #39, North River, New York City, on the morning of March 5, 1925, as per conversation with our Mr. Sabath. We waive our right to analyze the coal.

Yours very truly, American Palestine Line, Inc., by H. Epstein, General Manager.

[fol. 26] Claimant's Exhibit "A"

Letterhead of W. A. Marshall & Company

X-CWS. February 16, 1925.

American Palestine Line, Inc., 1493 Broadway, New York City.

Attention of Mr. Epstein

Gentlemen: We beg to submit a price of $5.10 per gross ton on our Shallmar bunker coal for delivery alongside

the S. S. "President Arthur," Morse Dry Dock, Brooklyn, N. Y., on approximately 3,650 gross tons.

Should we receive this order, we will use the combination of coals that we are in the habit of using on all of our steamship business, which would be approximately 50% of Melcroft coal and about 50% of our Bethel coal. We enclose a descriptive circular on each of these coals. We have had unusually good success with this combination of coals and feel that you will receive equally good results by their use.

Regarding terms of payment, we would require a trade acceptance payable on March 10th for the freight and boat freight which would amount to $3.04 per gross ton, and an additional trade acceptance for the balance, amounting to $2.06 per gross ton; these trade acceptances to be endorsed by responsible persons acceptable to us. Should this be acceptable to you, we would need prompt acceptance of this [fol. 27] order, so that we can start the loading of these boats. We have all of the coal standing at present. The second trade acceptance will be payable May 5th.

Yours very truly, W. A. Marshall & Company.
Charles W. Sandford, Manager Tidewater Dept.

CWS/AW.

c. c. to Mr. J. C. Meyerhoff, 1 Broadway, New York City.

CLAIMANT'S EXHIBIT "B"

$9,382.62. New York, March 6th, 1925.

May 8th, 1925, Pay to the order of W. A. Marshall & Company Nine thousand three hundred and eighty two and 62/100 dollars. Value received and charge the same to account of

W. A. Marshall & Company. David L. Morrison, Treas.

To American Palestine Line, Inc., No. 1493 Broadway, New York City, N. Y.

On the face of the trade acceptance appears the following:

[fol. 28] Accepted—March 6, 1925. Payable at National City Bank, 57th St. office. American Palestine Line, Inc., by James Wacht, Treasurer.

On the reverse side of the trade acceptance appear the following names in the order given:

Jacob Wacht, Jos. W. Gottlieb, Jacob S. Strahl, W. A. Marshall & Co., by David L. Morrison, Treasurer.

CLAIMANT'S EXHIBIT C—AFFIDAVIT OF CHARLES W. SANDFORD

SUPREME COURT, NEW YORK COUNTY

W. A. MARSHALL & COMPANY, Plaintiff,

against

JOSEPH W. GOTTLIEB, JACOB S. STRAHL, and JACOB WACHT, Defendants

Affidavit on Motion for Summary Judgment

STATE OF NEW YORK,
County of New York, ss:

Charles W. Sandford, being duly sworn, deposes and says:

[fol. 29] First. I am Manager of the Tidewater Department of W. A. Marshall and Company, the plaintiff in the above entitled action. In that capacity I negotiated the contract for the sale of certain coal by plaintiff to American Palestine Line, Inc., out of which came the trade acceptance here sued upon. I personally handled, and I am personally familiar with the matters set forth in this affidavit, which is made in support of a motion for summary judgment.

Second. On February 16, 1925, I wrote a letter to American Palestine Line, Inc., offering, on behalf of W. A. Marshall and Company, to sell a stated quantity of specified coal at a stated price. A copy of that letter is annexed to this affidavit as Exhibit "A" and made a part hereof. Further, I quote here the following sentence from that letter

that the court may observe one of the essential terms of the offer:

"Regarding terms of payment, we would require a trade acceptance payable on March 10th for the freight and boat freight which would amount to $3.04 per gross ton, and an additional trade acceptance for the balance, amounting to $2.06 per gross ton; these trade acceptances to be endorsed by responsible persons acceptable to us."

The Contracts

Third. Shortly after I had sent the letter marked Exhibit "A," American Palestine Line, Inc., accepted the offer verbally and followed up that acceptance by executing [fol. 30] a written contract dated February 18, 1925. A copy of that contract is annexed hereto marked Exhibit "B" and made a part hereof. However, at this point, I quote for the benefit of the court, four significant parts of said contract:

(Here follows portions of contract relative to right to analyze the coal and the terms of payment, Libellant's Exhibit No. 1 herein.)

Fourth. Subsequently, on March 4th, American Palestine Line, Inc., believing it would require more coal than that called for in the contract of February 18, 1925, made a second contract with W. A. Marshall and Company for an additional supply of coal amounting to 575 tons. A copy of said contract is annexed hereto, marked Exhibit "C," and made a part hereof. This second contract was practically identical with the first contract except as to dates and the amount of coal to be delivered. It included likewise the provisions quoted above.

(Here follow statements relative to deliveries.)

Trade Acceptances

Tenth. In accordance with the terms of the contracts I presented to the American Palestine Line, Inc., on behalf of W. A. Marshall and Co. two trade acceptances for the balance due on the coal, which were accepted by American

Palestine Line, Inc., and endorsed by Messrs. Gottlieb, Strahl and Wacht, the three individual defendants named in this action. A copy of the second trade acceptance is [fol. 31] hereto annexed, marked Exhibit "L," and made a part hereof. The first trade acceptance was duly paid.

Eleventh. Subsequently, the trade acceptance was presented through the Bank of America.

(Here follows statement that payment was refused and the draft protested for non payment.)

From the foregoing recital of the facts and from the other affidavits submitted upon this motion, it is plain that the defendants have no defense to this action on the trade acceptance. The facts as established by affidavits and exhibits submitted are as follows:

(a) Two contracts for the sale and delivery by plaintiff to American Palestine Line, Inc., of a total of 4225 tons of coal to come from Bethel and Moleroft mines.

(b) Specific provisions in said contracts that the trade acceptances in payment for said coal should be endorsed by the officers of the American Palestine Line, Inc., i. e., Joseph W. Gottlieb, Jacob S. Strahl and Jacob Wacht, the individual defendants in this action.

(c) Endorsements made by these individual defendants as part of the consideration of the sale of said coal by plaintiff to American Palestine Line, Inc.

* * * * * * *

[fol. 32] The claim that the defendants were accommodation endorsers for the benefit of W. A. Marshall and Co. is refuted by the terms of the offer and of the contracts and by their own signatures upon the contracts. Instead of being accommodation endorsers for the benefit of W. A. Marshall and Co., they are in fact straight endorsers, so far as W. A. Marshall and Co. is concerned, for without the consideration of such endorsements, the plaintiff would never have sold the coal to American Palestine Line, Inc.

Fourteenth. I am advised by the attorney for W. A. Marshall and Co. that the so-called defenses in law contained

in the amended answer are without any validity. These defenses are to the effect that there is another action pending in Admiralty in the United States District Court for the Southern District of New York against the S. S. President Arthur on the contracts themselves; and that the complaint is defective in failing to make the American Palestine Line, Inc., a party defendant. I am likewise advised by said Attorney that an action against the S. S. President Arthur in the United States Admiralty Court on the maritime contracts does not prevent an action in the State Court against the endorsers on the trade acceptance, and that in an action against endorsers it is not necessary to join the principal obligor.

* * * * * * *

On the evidence presented in the affidavits submitted in this motion, it is obvious that there is no real issue of fact to be tried and that there is no possible defense of which the defendants could avail themselves upon such a trial. I, [fol. 33] therefore, ask that an order be entered by this court striking out the amended answer of the defendants as a sham and a fraud and directing the entry of summary judgment on behalf of W. A. Marshall and Co. for the full amount demanded.

Charles W. Sanford.

Verified October 2nd, 1925.

CLAIMANT'S EXHIBIT D—AFFIDAVIT OF GEORGE W. HINCKLEY

SUPREME COURT, NEW YORK COUNTY

W. A. MARSHALL & COMPANY

against

JOSEPH W. GOTTLIEB, JACOB S. STRAHL, and JACOB WACHT, Defendants

STATE OF NEW YORK,
County of New York, ss:

George W. Hinckley, being duly sworn, deposes and says: First. I am the attorney for the plaintiff in the above entitled action and am making this affidavit in support of the

[fol. 34] plaintiff's motion for an order striking out the amended answer herein and granting summary judgment to the plaintiff.

* * * * * * *

B. As to the Charge that the Defendants were Accommodation Endorsers for the Benefit of W. A. Marshall and Co., Plaintiff Herein.

Eleventh. Were the defendants accommodation endorsers for W. A. Marshall and Co.? This question of fact is conclusively answered by the affidavit of Mr. Sandford and the annexed exhibits consisting of the offer to sell the coal and the two contracts therefor actually signed. These documents show that W. A. Marshall and Co. offered to sell the coal to the American-Palestine Line, Inc., only on condition that the trade acceptances to be given in payment would be signed by three endorsers acceptable to the plaintiff. The contracts themselves similar in form and for quantities of coal making up the aggregate, show exactly the basis upon which the defendants signed the trade acceptance here sued on. They were straight endorsers so far as W. A. Marshall and Co. is concerned. They gave their endorsements as part of the consideration moving from American-Palestine Line, Inc., to W. A. Marshall and Co. for the purchase of the coal in question. The plaintiff's offer shows that the plaintiff did not rely solely on the credit of the American-Palestine Line, Inc., and that the endorsement of these individual defendants was an essential prerequisite for the purchase of this coal by their corporation. The contract itself demonstrates that these individual defendants understood com- [fol. 35] pletely the significance of their endorsements.

(The language of the contract as to terms of payment is here quoted.)

* * * * * * *

It follows that the allegation of the defendants that they were accommodation endorsers for the benefit of W. A. Marshall and Co. is false and known to them to be false.

* * *

Under such conditions, I submit that the interests of justice and the dignity of this court require the granting of the relief here sought.

George W. Hinckley.

Verified October 15th, 1925.

In United States District Court

[Title omitted]

In Admiralty

Opinion—Sept. 13, 1928

Libel in rem to recover agreed price of bunker coal fur-
[fol. 36] nished to the Steamship "President Arthur."

In March, 1925, the American-Palestine Line, as owner of the S/S "President Arthur," entered into two written agreements with the libellant for the sale of approximately 3,225 gross tons of coal, as each agreement recites "to be used as bunker fuel for the said S/S 'President Arthur.'" Each agreement contains the following provisions with reference to the payment of the purchase price:

"The Buyer shall pay for the said coal as follows:

(1) By delivering to the Seller a trade acceptance drawn by it in favor of the Seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight at $2.79 a gross ton, which acceptance is to be endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.

(2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal, harbor barge freight and insurance on coal while in barges, which acceptance is also to be endorsed by the said Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb."

The entire contract between the parties is stated above and there is no outside condition, warranty, agreement,

or understanding. Certificate of weights according to railroad bill of lading.

Witness the signatures of the respective parties hereto."

[fol. 37] On each of the said agreements, below the signatures of the parties and above the signatures of the persons named as endorsers of the acceptances to be given by the Purchaser, there appears the following:

"In consideration of the execution of the foregoing contract, and the delivery of said coal by the Seller to the Buyer, and in consideration of One Dollar ($1.00) paid to each of the undersigned, the receipt of which is hereby acknowledged, we jointly and severally agree to endorse the said trade acceptance described in the foregoing contract between the Seller and the Buyer."

The libellant delivered 4,151 tons and 12 cwt. to the vessel. The purchase price, at $5.10 per ton, amounted to $21,736.16. Trade acceptances in this amount were given and received under the agreements. These have not been paid except to the extent of $11,790.50. For the balance of $9,382.62, with interest from March 6, 1925, the libellant claims a maritime lien against the vessel.

George Wright Hinkley, Proctor for Libellant (J. Markham Marshall and George Wright Hinkley of Counsel):

Lampke & Stein, Proctors for Claimant American Palestine Line, Inc. (Chauncey E. Treadwell of Counsel).

THACHER, D. J. (after stating the facts as above):

The rule is settled that when a note of a third party is taken at the time of the creation of a debt, as upon a sale [fol. 38] of goods, the presumption is that it was taken in payment.

Atlas S. S. Co. v. Columbian Land Co., 102 Fed., 358 (C. C. A., 2nd);

N. Y. & Cuba S. S. Co. v. Texas Co., 282 Fed., 221 (C. C. A., 2nd);

Hall v. Stevens, 116 N. Y., 301.

There is no need for such presumption in this case because the agreement expressly required payment coincidentally with the delivery of the coal by delivery of trade acceptances bearing three endorsements. The agreement which the parties made is conclusive, and if there were evidence of intention contrary to its terms this could not be considered. But there was no such evidence. In the face of the agreements no maritime lien could arise, because the coal was to be paid for on delivery. Even if a lien had arisen it certainly could not survive payment in the form the parties expressly contracted for, namely, the delivery of the acceptance. It is entirely clear, I think, that the libellant did not rely on the credit of the ship.

The libellant having no lien, its suit fails and the complaint will be dismissed with costs.

(Sgd.) Thomas D. Thacher, U. S. D. J.

September 13th, 1927.

[fol. 38a] In United States District Court

[Title omitted]

Final Decree—Oct. 10, 1927

This cause having duly come on to be heard in its regular order on June 3, 1927, upon the pleadings and proofs and having been argued and submitted by the advocates for the respective parties and the court, after due deliberation, having rendered its decision dismissing the libel herein, with costs, and claimant's costs having been duly taxed in the sum of $37.90,

Now, on motion of Lampke & Stein, proctors for the claimant, it is

Ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed with costs and that the [fol. 38b] claimant Lawrence S. Greenbaum, Receiver-in-Equity of the American Palestine Line, Inc., recover of the libelant W. A. Marshall & Co., Inc., and its stipulators for costs, the sum of $37.90, costs as taxed, which sum shall bear interest until paid and that the claimant have judgment against the said libelant therefor and it is further

Ordered, adjudged, and decreed that unless an appeal be taken from this decree within the time limited by the rules and practice of this court, that the stipulators for costs on the part of said libelant cause the engagement of their stipulations to be performed within ten days or to show cause within four days thereafter why execution should not issue against them to enforce satisfaction of this decree.

T. D. Thacher, U. S. D. J.

[fol. 39] In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that W. A. Marshall & Co., Inc., the libellant herein, hereby appeals to the Circuit Court of Appeals for the Second Circuit, from the Decree of the District Court in this cause, entered the 11th day of October, 1927, and from each and every part thereof.

Dated November 11, 1927.

Yours, etc., George Wright Hinckley, Proctor for Libellant, 50 Broadway, Manhattan, New York City.

To Alexander Gilchrist, Esq., Clerk of United States District Court, Southern District of New York; Lampke & Stein, Esqs., Proctors for Claimant, 29 Broadway, Manhattan, New York City.

[fol. 40] In United States District Court

[Title omitted]

Assignment of Errors

W. A. Marshall & Co., Inc., the libellant-appellant, assigns as errors in the District Court:

1. The finding and decision that libellant had taken the note of a third party.

2. The finding and decision that the provision of the contracts requiring delivery by buyer of its trade acceptances bearing three indorsements, was conclusive proof of intention that such acceptances were taken in absolute payment.

3. The finding and decision that there was no evidence that buyer's trade acceptances bearing three indorsements were not taken in absolute payment.

4. The decision that evidence was not admissible that buyer's acceptances bearing three indorsements were not taken in absolute payment.

5. The finding and decision that no maritime lien could arise in the face of the agreements of the parties.

[fol. 41] 6. The finding and decision that even if a maritime lien had arisen it could not have survived the taking by the seller of buyer's acceptances bearing three indorsements.

7. The finding and decision that it was entirely clear that libellant did not rely on the credit of the ship.

8. The decision that claimant was entitled to a decree dismissing the libel.

9. The failure of the District Court to find and decide that libellant was entitled to a decree for the full amount claimed with interest and costs.

George Wright Hinckley, Proctor for Libellant-Appellant. Office and Post Office address: No. 50 Broadway, Manhattan, New York City.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated December 1, 1925.

George Wright Hinckley, Proctor for Libellant.
Lampke & Stein, Proctors for Claimant.

[fol. 43] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 44] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1927

No. 233

Argued March 14, 1928. Decided April 9, 1928

W. A. Marshall & Co., Inc., Libelant-Appellant,

v.

Steamship President Arthur, Her Engines, Boilers, etc., Claimant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Augustus N. Hand, Circuit Judges

Opinion

Appeal from the District Court for the Southern District of New York. Libel filed by W. A. Marshall & Co., Inc., to enforce a maritime lien against the steamship President Arthur for coal supplied. Decree for claimant; libelant appeals. Affirmed.

George Wright Hinckley, of New York City, for appellant.

Lampke & Stein, of New York City (Chauncey E. Treadwell, of New York City, of counsel), for appellee.

Saul S. Myers, John M. Woolsey, and Joseph K. Guerin, all of New York City, amici curiæ.

Manton, Circuit Judge.

In March, 1925, appellant supplied bunker coal to the President Arthur and seeks to enforce a lien for a balance unpaid. It is not denied that the coal was supplied, but it is contended by the appellee that the coal was supplied pursuant to written contract providing for payment on deliv-

ery by giving a trade acceptance indorsed by three individuals, and it is asserted that by reason thereof no maritime lien exists against the vessel. The contract provided:

"The buyer will pay for the said coal as follows:

"(1) By delivering to the seller a trade acceptance drawn by it in favor of the seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be indorsed by Jacob Wacht, Jacob S. Strahl, and Joseph W. Gottlieb.

"(2) A trade acceptance drawn by the buyer in favor of the seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit, $2.31 a gross ton, representing the coal, harbor barge freight and insurance on coal while in barges, which acceptance is also to be indorsed by the said Jacob Wacht, Jacob S. Strahl, and Joseph W. Gottlieb.

"The entire contract between the parties is stated above, and there is no outside condition, warranty, agreement, or understanding."

After the signature on the contract, it is provided:

"In consideration of the execution of the foregoing contract, and of the delivery of said coal by the seller to the buyer, and in consideration of one dollar ($1.00) paid to each of the undersigned, the receipt of which is hereby acknowledged, we jointly and severally agree to indorse the said trade acceptances described in the foregoing contract between the seller and the buyer."

On February 15, 1925, the appellant's sales manager testified that they looked into the financial standing of the owners of the vessel and came to the conclusion that they did not like the account and wanted to get trade acceptances [fol. 45] in order "to get the money at any time they wanted—in fact to discount that paper." And he said, "We were not satisfied with the credit of the American-Palestine Line." He wrote appellee on February 16th that they wanted trade acceptances to be indorsed by three responsible persons acceptable to them. He testified further that they did not consider the Palestine Line financially responsible, and insisted upon the indorsement so that they could discount the paper "in case we need it at any time."

It is significant that the agreement provides that the indorsements were made by these individuals as part of the consideration of the sale of the coal, and it was sworn in an affidavit that, without the consideration of such indorsements, the appellant would never have sold the coal to the American-Palestine Line. There was "no outside condition, warranty, agreement or understanding." Thus it appears that the credit of the ship was not accepted by the appellant, but, by the contract of the parties, trade acceptances with three indorsers were insisted upon, and everything for which the appellant had contracted was given in payment. Cash was not contracted for, but payment other than cash was accepted. It was, as said by Chief Justice Taney in Phelps v. The Camilla, Taney 400, Fed. Cas. No. 11073 (Md. 1838):

"If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue."

This rule has not been departed from by authoritative decisions. See Segrist v. Crabtree, 131 U. S. 287, 9 S. Ct. 687, 33 L. Ed. 125; McMurray v. Brown, 91 U. S. 257, 23 L. Ed. 321; N. Y. & Cuba S. S. Co. v. Texas Co. (C. C. A.) 282 F. 221; Atlas S. S. Co. v. Columbian Land Co. (2 C. C. A.) 102 F. 358.

The Merchant Marine Act of 1920 (46 U. S. C. A. § 974; Comp. St. § 8146¼ppp) provides that:

"Nothing in this section shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise."

To support a lien, the act provides "it shall not be necessary to allege or prove that credit was given to the vessel." Nothing in the act bars proof that whatever was furnished

was furnished on the mere credit of the owner or third party and in no sense upon the credit of the ship. Ely v. Murray (C. C. A.) 200 F. 368. A lien does not exist where the supplies are furnished on the mere credit of the owner. The Cora P. White (D. C.) 243 F. 246. There is marked distinction between the effect of taking a note for an obligation which already existed, and agreeing in a contract which referred to an obligation hereafter to arise, that the payment of that obligation must be made by promissory note. The trade acceptance, assuming a default in payment, permitted the appellant to sue the indorsers. This it did.

The maritime lien is not to be given a broad legal interpretation, nor is it to be extended by construction, analogy, or inference. Osaka Shosen Kaisha v. Pacific Export Lumber Co., 260 U. S. 490, 43 S. Ct. 172, 67 L. Ed. 364; Piedmont Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 12, 41 S. Ct. 1, 65 L. Ed. 97. Where parties agree to an express contract as to payment, the contract becomes extinguished by full performance and so it is impossible that either party should have any claim against the other arising out of the contract. No lien can exist in favor of the materialman when he receives in payment that for which he stipulated when the contract was made.

In The Bird of Paradise, 5 Wall. 545, 18 L. Ed. 662, referred to by appellant, a lien was asserted for freight. That lien differs from a maritime lien for repairs because a ship is bound to the cargo until delivery or tender of delivery and equally is the cargo bound to the ship for the payment of freight. The freight contract provided that it should be paid in Liverpool on unloading and right delivery of the cargo. Construing the clauses of the bill of lading together, it was clear that the charterer was not obliged to pay the freight until tender of delivery. While the charterer did give the first acceptance, he failed in business, and the acceptance was dishonored before the arrival of the ship, and he never gave or tendered the second acceptance mentioned in the charter party. It was held that [fol. 46] the lien remained. The court stated that the freight lien "stands upon the same ground with the lien of the carrier on land, and arises from the right of the shipowner to retain the possession of the goods until the freight

is paid, and is lost by an unconditional delivery to the consignee." And that the freight lien "may be modified, or it may excluded, or displaced by direct words, or by the insertion of some stipulation wholly incompatible or irreconcilable with the existence of such a right." Requiring the appellee to procure indorsements of three separate individuals was such a stipulation as is referred to in the language quoted, and the appellant relied solely upon the indorsements and not on the maritime lien, for it refused to sell until it had the agreed indorsements.

Decree affirmed.

[fol. 47] In United States Circuit Court of Appeals

No. 233

October Term, 1927

Argued March 14, 1928. Decided April 9, 1928

[Title omitted]

Dissenting Opinion

L. Hand, Circuit Judge (dissenting): There are two questions at issue—first, whether the acceptances were a payment; if not, whether their receipt by the libelant was a "waiver" (of) "his right to a lien * * * by agreement or otherwise." If the claimant had not been a party to the acceptances, it may be assumed that they would have been a payment. Atlas S. S. Co. v. Colombian Land Co., 102 F. 358 (C. C. A. 2); N. Y. & Cuba S. S. Co. v. Texas Co., 282 F. 221 (C. C. A. 2); Hall v. Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802. If, on the other hand, it had agreed only to deliver its note, and had done so, the note would not have been a payment. The doctrine that a note, in the absence of an agreement to that effect, is not payment, is not limited to cases where it is given upon a pre-existing debt, but equally applies when the only promise is to deliver it. The Bird of Paradise, 5 Wall. 545, 18 L. Ed. 662; Reed v. Van Ostrand, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529; Combs v. Bateman, 10 Barb. (N. Y.) 573. Logically, it

is true, the promise is performed when the note is delivered, but the law looks to the essence, which is the payment of the money, of which the note is only another promise. When the buyer is to deliver the note of another person he has never agreed to pay at all, but if he joins in the paper, the presence of other obligors does not affect his primary obligation. As he still remains liable, he has never paid.

The question of "waiver" is more difficult. Under the maritime law, the cases were in great conflict as to what security taken at the time forbade the inference that the buyer meant to rely on the ship. The strongest case for the claimant is a bottomry bond, and this was held to "waive" the lien. The Ann C. Pratt, Fed. Cas. No. 409, affirmed sub nom. Carrington v. The Ann C. Pratt, 18 How. 63, 15 L. Ed. 267. It would seem that a mortgage was equally strong evidence of the same intent, but the decisions are at variance. In The A. R. Dunlap, Fed. Cas. No. 513, The D. B. Steelman (D. C.) 48 F. 580, The Thomas Morgan (D. C.) 123 F. 781, The Cimbria (D. C.) 214 F. 128, and The Fairhope (D. C.) 235 F. 1007, the lien survived such a mortgage, but not in The Lucille (D. C.) 208 F. 434, and The Yankton (D. C.) 7 F. (2d) 384.

Other kinds of security have also an equivocal effect. The Circuit Court of Appeals for the Fifth Circuit held that a wharfinger's lien was not waived by taking a surety bond in advance (El Amigo, 285 F. 868), and [illegible] lien was not waived by retaining title to the machinery installed (Ricou v. Fairbanks, Morse & Co. [C. C. A.] 11 F. [2d] 103). The Pearl (D. C.) 189 F. 540 and The E-270 [fol. 48] (D. C.) 16 F. (2d) 1005, are in accord with the last case. The acceptance of an unindorsed note of the owner is not a "waiver." The Kimball, 3 Wall. 37, 18 L. Ed. 50; The Bird of Paradise, 5 Wall. 545, 18 L. Ed. 662, supra. Judge Brown held the same of the note of a third person in The James T. Easton (D. C.) 49 F. 656, and Judge Betts in The Active, Fed. Cas. No. 34. In Moore v. Newbury, Fed. Cas. No. 9772, and The Theodore Perry, Fed. Cas. No. 13879, the same was held as to indorsed paper, taken, however, after the goods had been sold. Justice Miller on the other hand held flatly the contrary at Circuit (Taylor v. Commonwealth, Fed. Cas. No. 13787), even though the note

was in fact never delivered. On the facts it is hard to see how this conclusion could have been reached. In Phelps v. The Camilla, Fed. Cas. No. 11073, Chief Justice Taney at Circuit decided that when the sellers took notes of the ship's agent, they showed that they meant to rely upon them and not upon the ship, and he added obiter that the taking of a note would have released a lien anyway.

Mechanics' liens are not released by a reservation of title (Chic. & Alton R. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 3 S. Ct. 594, 27 L. Ed. 1081; Leschen, etc., Co. v. Mayflower, etc., Co., 173 F. 855, 35 L. R. A. [N. S.] 1 [C. C. A. 8]; Hooven, etc., Co. v. Featherstone, 111 F. 81, 95 [C. C. A. 8]), nor by taking other security (Smith v. Butts, 72 Miss. 269, 16 So. 242; Hinchman v. Lybrand, 14 Serg. & R. [Pa.] 32; Phelps Lumber Co. v. McDonough Mfg. Co., 202 F. 445 [C. C. A. 9]). Perhaps this is because such liens are favored, unlike maritime liens or those of vendors. Cortelyou v. Lansing, 2 Cai. Cas. [N. Y.] 587; Williams v. Roberts, 5 Ohio, 35; Griffin v. Blanchar, 17 Cal. 70.

It must be confessed, therefore, that the decisions are confused and that on authority the case might go either way. Before 1910 the question was whether the seller had shown that he had taken the credit of the ship and not that of the owner, though prima facie he succeeded if the ship were in a foreign port. The statute has, however, changed the burden (Piedmont Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 12, 41 S. Ct. 1, 65 L. Ed. 97), because it establishes the lien whenever the goods are ordered by any of the specified persons. Why should the seller not want some added security, or be understood to take the note in substitution for the lien?

The claimant must show just that; he must affirmatively prove, there being no agreement and no estoppel, that the parties could not have intended both securities to stand together. I can find no warrant for so strong a conclusion. Maybe, if the libelant still had the burden, this evidence would not show positively enough that he had given credit to the ship. But he has not got to do that any longer; the boot is on the other leg, and the claimant must show that the lien was released, for that, in substance, appears to me to be the equivalent of "waived" under these circumstances.

POOR COPY

The proof falls far short of that. Courts may still look jealously at maritime liens, but the statute has accomplished something and that in their favor. If it has not even gone so far as meets the libelant's needs here, I should think it had done nothing at all. I think that the decree should be reversed.

[fol. 49] In United States Circuit Court of Appeals, Second Circuit

W. A. Marshall & Company, Inc., Libellant-Appellant,

v.

Steamship "President Arthur," American Palestine Line, Claimant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed April 16, 1928

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M. L. H.

[File endorsement omitted.]

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 15, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,581. U. S. Circuit Court of Appeals, Second Circuit. Term No. 272. W. A. Marshall & Co., Inc., petitioner, vs. Steamship "President Arthur," her engines, boilers, etc. Petition for writ of certiorari and exhibit thereto. Filed July 14th, 1928. File No. 33,581.

JUL. 14 19
CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1928.

F No. 272

THE PETITION OF W. A. MARSHALL & CO., INC., FOR A WRIT OF CERTIORARI DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT TO BRING BEFORE THIS COURT THE CASE OF

W. A. MARSHALL & CO., INC.,

Libellant-Appellant,

v.

STEAMSHIP "PRESIDENT ARTHUR," HER ENGINES, BOILERS, ETC.,

Claimant-Appellee.

PETITION AND BRIEF.

GEORGE WRIGHT HINCKLEY,
for the Petitioner.

PRESS OF PUBLISHERS PRINTING, NEW YORK CITY

INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
Statement of Facts	1
Reasons for Granting Petition	4
BRIEF IN SUPPORT OF PETITION	8
The holdings below as to when a note is payment are contrary to the applicable decisions of this court	8
The holdings below as to when the taking of a note constitutes a waiver of maritime lien are contrary to the applicable decisions of this court	10
The holdings below nullify the Merchant Marine Acts of 1910 and 1920	11
The decisions of the Circuit Court of Appeals for the Second Circuit is in conflict with the decisions of the Circuit Courts of Appeals for the Fifth and Eighth Circuits	12
Conclusion	15
REPORTS OF OPINIONS OF COURTS BELOW:	
Opinions of Circuit Court of Appeals; Manton, Circuit Judge, writing: Record, p. 44.	
L. Hand, Circuit Judge, dissenting and writing: Record, p. 48. 25 F. (2) 648.	
Opinion of District Court (Thacher, District Judge), Record, p. 35, 22 F. (2) 584.	

Cases Cited.

Atlas S. S. Co. v. Colombian Land Co., 102 F. 358 9

Bird of Paradise, The, 5 Wall. (72 U. S.) 545 ..... 5, 9, 10

Bronx, The, 246 F. 809 12

El Amigo, 285 F. 868 ..... 6, 12

Emily Souder, The, 17 Wall. (84 U. S.) 666 ..... 5, 8

Kokoma Strawboard Co. v. Inman, 134 N. Y. 92 9

Leschen & Sons Rope Co. v. Mayflower G. M. & R. Co., 173 F. 855 ..... 6, 14

N. Y. & Cuba S. S. Co. v. Texas Co., 282 F. 221 9

Phelps v. The Camilla, Taney 400, Fed. Cas. 11073 ..... 4, 11

Piedmont Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1 ..... 5, 6, 11, 12

Ricou v. Fairbanks, Morse & Co., 11 F. (2) 103 ..... 6, 13

St. Jago de Cuba, The, 9 Wheat. 409 ..... 5, 6, 11

Statutes Cited.

Judicial Code, Section 240 (a) 8

Merchant Marine Act of June 23, 1910, c. 373, §1; 36 Stat. 604 (Comp. 1913, §7783) 5, 11

Merchant Marine Act of June 5, 1920, c. 250, §30, subsecs. P & S; 41 Stat. 1005 (44 U. S. C. §§971, 974) 4, 5, 11, 12

Supreme Court of the United States

OCTOBER TERM, 1928.

No.

The petition of W. A. Marshall & Co., Inc., for a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit to bring before this court the case of

W. A. MARSHALL & CO., INC.,

Libellant-Appellant,

v.

Steamship "PRESIDENT ARTHUR," her engines, boilers, etc.,

Claimant-Appellee.

PETITION.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioner prays for a writ of certiorari to review a final decree in admiralty by the Circuit Court of Appeals for the Second Circuit rendered on April 16, 1928 (Record p. 51) affirming a decree of the District Court for the Southern District of New York.

Statement.

The question below was whether or not a contract for supply of bunker coal supported a maritime lien.

There is no dispute as to the facts in this case as libellant's witness alone was called.

The American Palestine Line, owner of the SS. "President Arthur" negotiated a contract with petitioner, coal suppliers, for approximately 4150 tons of coal as bunkers for that steamer. In the negotiations for the supply, it developed that owner wished longer terms of payment than petitioner usually granted (fol. 40). Accordingly petitioner insisted upon trade acceptances as a means of payment so that by discounting these it might, if it desired, be put in funds prior to the day ultimately stated for payment (fol. 40). Investigation disclosed that on account of owner's financial standing, its paper was not discountable and so acceptable indorsements were demanded. These were the sole purposes in payment by acceptances and of the indorsements thereon (fols. 51, 55).

Two contracts, dated February 18, 1925, and March 4, 1925, respectively, resulted from these negotiations. The terms of payment provided therein were as follows:

> "The buyer will pay for the said coal as follows:
>
> (1) By delivering to the seller a trade acceptance drawn by it in favor of the Seller, dated the date of delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.
>
> (2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal, harbor barge freight and insurance on coal while in barges, which acceptance is also to be endorsed by the said Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.

The coal was delivered and the acceptances given. The first acceptance for an amount equal to the railroad freight

on the coal delivered under both contracts, was paid at maturity (fol. 48). The second acceptance, for the balance due under both contracts, was not and never has been paid (fol. 91).

The libel herein for the unpaid balance of the purchase price was filed and the "President Arthur" arrested May 11, 1925 (fol. 2). A civil action upon the unpaid acceptance but against the indorsers only, was commenced in the state court June 18, 1925, and is still pending and undetermined (fols. 22, 23, 52). Over objection, claimant offered in evidence two affidavits submitted by petitioner on a motion for summary judgment in such civil action (Claimant's Exhibits C and D, fols. 83-104) in which affidavits the indorsement of the acceptance by the individuals there sued was stated to have been "part of the consideration" for the sale of the coal (fols. 93, 102).

Both the District Court and the Circuit Court of Appeals have dismissed the libel.

The primary ground of decision of the District Court is that as the contract required payment coincidentally with the delivery of the coal by delivery of trade acceptances of the owner bearing three indorsements, fulfillment of this requirement was payment and hence no lien could arise.

The grounds of decision of the Circuit Court of Appeals, to which a dissenting opinion was written by Judge Learned Hand, may be briefly summarized as follows:

First: "Where parties agree to an express contract as to payment" (even though this be by notes of the original debtor) "the contract becomes extinguished by full performance" (that is by the mere giving of the notes even though they be not paid at maturity) "and so it is impossible that either party should have any claim against the other arising out of the contract" (Opinion, p. 47).

Second: Cash was not contracted for, but a payment other than cash was provided by the contract, hence

"• • • If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue."

Phelps v. *The Camilla*, Taney 400, Fed. Cas. No. 11,073 (Md. 1838).
(Opinion, p. 46.)

Third: The Merchant Marine Act of 1920, which provides that to support a lien "it shall not be necessary to allege or prove that credit was given to the vessel," provides also that nothing in that act shall prevent the furnisher of supplies from waiving his right to a lien by agreement or otherwise. The right to the lien may be displaced "by the insertion of some stipulation wholly incompatible or irreconcilable with the existence of such a right." Requiring indorsements of owner's acceptances was such a stipulation; *ergo* "the appellant relied solely upon the indorsement and not upon the maritime lien" (Opinion, pp. 46-48).

Reasons for Granting Petition.

Your petitioner urges that the decision of the Circuit Court of Appeals should be reviewed by the court for the following reasons:

1. In view of the revived and greatly extended use of "trade acceptances" as a means of payment under the regu-

lations of the Federal Reserve Bank Board by merchants generally, and particularly by those connected with shipping, it is desirable that this court define the limitations to which they are subject when used in connection with contracts with ship owners.

2. The decision of the Circuit Court of Appeals is contrary to the decisions of this court in respect of when a note constitutes payment. In *The Emily Souder*, 17 Wall. (84 U. S.) 666, it was held that the taking of master's drafts on owners, even though by agreement and coincident with the creation of the debt, was only conditional payment and that "nothing can be payment in fact except what is in truth such." In *The Bird of Paradise*, 5 Wall. (72 U. S.) 545, the taking of an acceptance, for a portion of the freight, so provided in the charter party, was held not to be payment.

3. The decision of the Circuit Court of Appeals is contrary to the decisions of this court in respect of when the taking of a note constitutes a waiver of a maritime lien. In *The Bird of Paradise*, *supra*, this court held that a charter party that provided for payment of freight by delivery of charterer's acceptances, the one at the time of loading and maturing prior to the delivery of the cargo and the other to be delivered subsequent to the delivery of the cargo was, as to the first, a conditional payment merely and was not a waiver of the maritime lien but as to the second acceptance there was a waiver of lien *pro tanto*. Further the decision herein nullifies the Merchant Marine Acts of 1910 and of 1920 and places the material man and supplier back in the same position in which he was prior to the passage of the acts. As stated in *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 11, the acts were designed to correct the doctrine of earlier cases: *The St. Jago de Cuba*, 9 Wheat. 409, and others, which held that it was for the seller to show that he had

relied on the credit of the ship and not on that of the owner. The acts not only changed this burden of proof but permitted the supplier to rely upon the credit of both ship and owner (*Piedmont Coal Co.* v. *Seaboard Fisheries Co., supra*).

4. This decision of the Circuit Court of Appeals for Second Circuit is in conflict with the decisions of the Circuit Courts of Appeals of other Circuits. In the Fifth Circuit it was held in *El Amigo*, 285 F. 868 and *Ricou* v. *Fairbanks, Morse & Co.*, 11 F. (2) 103, that the lien is not waived even when other security than that of the ship be provided. In the Eighth Circuit it was held in *Leschen & Sons Rope Co.* v. *Mayflower G. M. & R. Co.* 173 F. 855, that where a contract provided for reservation of title until the last payment be made and such payment was to be made subsequent to the delivery of the materials by buyer's 60 day note, the taking of the note was not absolute payment and did not waive the reservation of title.

WHEREFORE, your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring up the case to this Honorable Court for such proceedings therein as may be just.

W. A. MARSHALL & CO., INC.,
By JOHN D. KLINE,
Vice-President.

State of New York,
County of New York, } ss.:

John D. Kline, being duly sworn, deposes and says that he is the vice-president of W. A. Marshall & Co., Inc., the petitioner herein; that he has read the foregoing petition and that the facts therein stated are true to the best of his knowledge, information and belief.

JOHN D. KLINE.

Sworn to before me
this 13th day of July, 1928.

KATE HORN, (Notarial Seal)
Notary Public,
New York County No. 338.

I hereby certify that I have examined the foregoing petition, and that, in my opinion, the same is well founded and is entitled to the favorable consideration of this Honorable Court.

GEORGE WRIGHT HINCKLEY,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Application is made under Section 240 (a) of the Judicial Code for certiorari to review a final decree in admiralty rendered by the Circuit Court of Appeals for the Second Circuit on April 16, 1928, and shown on page 51 of the Record.

POINT I.

The holdings below as to when a note is payment are contrary to the applicable decisions of this court.

The decision below holds that where an owner by agreement promises to deliver his note coincidentally with the creation of the debt, such note is payment whether or not the same be paid at maturity.

In the case of *The Emily Souder*, 17 Wall. (84 U. S.) 666, the vessel arrived in distress at a port in Brazil. The captain was without sufficient funds to provide for the necessary repairs, supplies and expenses, but, through the consul, secured one willing to make the advances upon reasonable commission, taking the captain's drafts on owners in payment. The drafts were not paid and the vessel was libelled. Mr. Justice Field, in his opinion at page 670, states the law as follows:

> "The drafts given by the captain upon the owners of the vessel in New York were not received by the libellants in discharge and satisfaction of the sums advanced. They were received only as conditional payment. Such would be the presumption of law in the absence of any direct evidence on the point. For by the general commercial law of the world, a promise to pay, whether in the form of notes or bills,

> is not of itself the equivalent of payment: it is treated everywhere, in the absence of express agreement or local usage to the contrary, as conditional payment only. On principle, nothing can be payment in fact except what is in truth such, unless specially agreed to be taken as its equivalent."

There is "no local usage to the contrary" in New York, where the effect of the provision of a contract for payment by delivery of purchaser's acceptances has been held to be a mere extension of the time of payment, and that upon default in payment of the acceptances the seller may treat the contract as terminated and sue for the value of the goods furnished. (*Kokomo Strawboard Co.* v. *Inman, et al.*, 134 N. Y. 92, 94.)

In the case of *The Bird of Paradise*, 5 Wall. (72 U. S.) 545, the contract provided "the freight to be paid in Liverpool * * *, one fourth in cash, one fourth by acceptance of charterer at six months from the final sailing of the vessel and the remainder by like bill, at three months from delivery, etc." The cash was paid on loading and the first of the two acceptances was given but not paid. Mr. Justice Clifford, in giving the decision of this court, referring to the acceptance given but unpaid, stated at page 561:

> "Payment of that instalment of the freight is not proved, * * * Ship-owner under the circumstances has a right to stand upon the original contract and to seek his remedy to that extent of his claim in the form to which it originally belonged as fully as if the acceptance had never been given."

The error of the Circuit Court of Appeals was the same as that of the District Court. It applied the doctrine that taking the note of a *third party* at the time of the creation of a debt is presumed to be payment (*Atlas S. S. Co.* v. *Colombian Land Co.*, 102 F. 358, 360 [C. C. A. 2]; *N. Y. &*

Cuba S. S. Co. v. *Texas Co.*, 282 F. 221, 223 [C. C. A. 2]), whereas in the instant case petitioner took the note—the acceptance—of the original debtor. The owner remained primarily liable notwithstanding the indorsements. The doctrine of novation does not apply.

POINT II.

The holdings below as to when the taking of a note constitutes a waiver of maritime lien are contrary to the applicable decisions of this court.

In *The Bird of Paradise*, *supra*, the question was not only whether the taking of charterer's acceptances for portions of the freight, so provided in the charter party, constituted payment of the freight but also whether an agreement so to take such acceptances operated as a waiver of the lien. Mr. Justice Clifford held the lien for freight is maritime and may be enforced by a proceeding *in rem;* presumption is in favor of the lien, but it may be displaced by some stipulation incompatible with such a right. In respect of the provision for the first acceptance for one fourth of the freight, maturing prior to time of delivery of the cargo, he found no incompatibility or irreconcilability. He said at page 561, "there is no evidence in the record tending to show that the lien for that instalment of the freight was ever waived." As to that portion of the freight covered by the acceptance which was not even to be given until notice had been received in Liverpool of right delivery of the cargo in San Francisco, he held that there the stipulation was incompatible with the retention of the lien and that the lien was waived *pro tanto*. This result is clearly contrary to the observations of the Circuit Court of Appeals in respect of this case (Opinion, p. 47).

POINT III.

The holdings below nullify the Merchant Marine Acts of 1910 and 1920.

Prior to the Maritime Lien Act of 1910, there was a very considerable confusion in the law relating to a supplier's lien on vessels. Difficulties and anomalies arose through early cases. The one which has a bearing on the question which is here considered is *The St. Jago de Cuba*, 9 Wheat. (22 U. S.) 409, decided in 1824. The doctrine of that case was that when the owner of a vessel contracts in person for necessaries or is present at the port where these are ordered, it is presumed that the supplier did not intend to rely upon the credit of the vessel. In *Phelps v. The Camilla*, Taney 400; Fed. Cas. 11073 (Md. 1838), which is cited and quoted from by the Circuit Court of Appeals as controlling the instant case (Opinion, p. 46), Justice Taney in denying the lien expressly followed the doctrine of *The St. Jago de Cuba* case and held there was no difference in principle between a purchase by the owner and one by his agent residing at the place of purchase. He held also that libellant sold the material to the agent on his personal credit and that he in turn supplied the vessel, adding *obiter* that the taking of a note would have released the lien anyway.

Many and varying evils arose from the doctrines of these earlier cases and the presumption as to whom or to what the credit was extended. Finally, in 1910, Congress passed the Merchant Marine Act which this Court in *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U. S. 1, 11, stated was for the express purpose of doing away with the doctrine of *The St. Jago de Cuba* case. No longer is there a presumption that under any circumstances the supplier did not rely upon the credit of the vessel. The burden of proving that supplier did not rely upon the credit of the vessel is now upon the claimant.

> "* * * *the lien is presumed* on proof of due delivery on request of lawful supplies, *until such presumption is destroyed by affirmative proof of agreement that the promising party was to be exclusively liable* for payment." (Italics ours.)

Judge Hough in *The Bronx*, 216 F. 809, 810 (C. C. A. 2).

> "A vessel may be made liable *in rem* for supplies, although the owner can be made liable therefore *in personam*; *since the dealer may rely upon the credit of both.*" (Italics ours.)
>
> *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U. S. 1, 10.

In the instant case there was no "affirmative proof of agreement that the promising party was to be *exclusively liable for payment.*" (Italics ours.) The court below held that although there was no specific agreement to waive the lien and no estoppel but merely because the supplier had by agreement some security beyond the vessel he did not rely upon the credit of the vessel as well. This nullifies the Merchant Marine Act by depriving the supplier of the lien which that act expressly gives him.

POINT IV.

The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with decisions of the Circuit Courts of Appeals for the Fifth and Eighth Circuits.

The Circuit Court of Appeals for the Fifth Circuit has twice held that the taking by agreement of other security than the lien on the vessel does not constitute a waiver of the lien. In *The El Amigo*, 285 F. 868 (1923), one Miller

had given the City of Houston a bond with surety conditioned "that payment be made of all dockage and other charges accruing in favor of the city from ships operated by Miller." The court then said, at pages 870-871:

> "The terms of the bond do not indicate that the acceptance of it was intended to have the effect of waiving, releasing, or discharging any lien the city might acquire. There was no evidence that the city consented to give up its lien, or that the bond was accepted in lieu of claims which might arise in the city's favor for wharfage, etc. That being so, the city's acceptance of the bond did not deprive it of its lien."

Again in *Ricou* v. *Fairbanks, Morse & Co.*, 11 F. (2) 103 (1926), decided also by this same court, an engine had been supplied the vessel under a contract containing a reservations of title. On holding the exceptions to the libel to be without merit, the court said, at pages 104-105:

> "• • • under the terms of the above quoted statute, one who furnishes repairs, supplies, or other necessaries to a vessel upon the order of its owner has a maritime lien on such vessel, whether he does or does not allege or prove that he did so on the credit or faith of the vessel."
>
> "• • • the libel showed that the equipment covered by the written contract was furnished by the appellee to the boat on the order of its owner. The retention by contract of the title to such equipment as security for the purchase price was not inconsistent with the existence of the lien given by the statute, and did not prevent the appellee from asserting that lien."

In both of these cases there was no mention of retention of the security of the vessel and other security was provided for by agreement made prior to incurring the debt. The decisions in the Fifth and Second Circuits cannot

be harmonized or differentiated and are clearly in conflict with one another.

Leschen Rope Co. v. *Mayflower G. M. & R. Co.*, 173 F. 855 (C. C. A. 8) did not involve a maritime lien but a reservation of title. The contract provided for delivery of certain materials with certain payments therefor, the final amount "to be paid by your note at sixty days, • • • not later than sixty days from the arrival of the last shipment." Title was to remain in the seller and it might retake possession "in default of the last payment being made." The final note was given but not paid. Seller sought to replevy the materials. The court held the debt "remained unpaid, and will remain unpaid, until the note is paid." It said further, at page 858:

> "where the extinguishment of a debt has the effect to strike down a lien or a title securing its payment, the presumption that it is not discharged by the acceptance of the note of the debtor in payment of it is strengthened, because in such a case the discharge of a lien is more unusual and unreasonable. 'The Kimball,' 3 Wall. 37, 45, 18 L. Ed. 50; Sweet & Carpenter v. James, 2 R. I. 270, 294, 297; 'The Bird of Paradise,' 5 Wall. 545, 18 L. Ed. 662."

Thus, the holding of the court below that "where parties agree to an express contract as to payment, the contract becomes extinguished by full performance and so it is impossible that either party should have any claim against the other arising out of the contract" is in direct conflict with this decision of the Circuit Court of Appeals for the Eighth Circuit. There is no distinction between the security of title reserved, as in the case just cited, and a maritime lien in the respect that neither can survive payment.

Conclusion.

It is respectfully submitted that the writ of certiorari should be granted as prayed for.

GEORGE WRIGHT HINCKLEY,
For Petitioner.

JAN 2
CHARLES ELM

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 272.

W. A. MARSHALL & CO., INC.,
Petitioner,

against

Steamship "PRESIDENT ARTHUR", her engines, boilers, etc.,
Respondent.

BRIEF FOR PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

GEORGE WRIGHT HINCKLEY,
for the Petitioner.

PRESS OF FREMONT PAYNE, NEW YORK CITY

SUBJECT INDEX

PAGE

STATEMENT 2

SUMMARY OF ARGUMENT 5

POINT I. The note (the acceptance) of the owner, even when received under the contract, is not such payment as to satisfy and terminate the original obligation unless the note itself be paid 6

The Decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this court 10

POINT II. By the Maritime Law one furnishing supplies has a maritime lien therefor 10

The Maritime Lien Act settled the confusion in the law and accorded the supplier a lien, the relinquishment of which can be established only by clear and affirmative proof of waiver 12

POINT III. Petitioner has not waived its right to a maritime lien by agreement or otherwise 14

The stipulation of the contract for payment by owner's "acceptances" does not waive the maritime lien 15

The Decision of the Circuit Court of Appeals in respect of waiver by stipulation for notes is in conflict with decisions of this court and of the Circuit Court of Appeals for the Eighth Circuit 18

The stipulation of the contract requiring indorsements of owner's "acceptances" did not waive the maritime lien 19

The decision of the Circuit Court of Appeals is in conflict with the decisions of the Circuit Court of Appeals for the Fifth Circuit, which support the lien 21

CONCLUSION 22

Table of Cases Cited

PAGE

Bird of Paradise, 5 Wall. (72 U. S.) 545 . . . .2, 9, 15, 16, 19

Bronx, 246 F. 809 . . . . . 13, 20, 22

E-22, 16 F. (2) 1005 22

El Amigo, 285 F. 868 . . . . . 2, 21

Emily Souder, 17 Wall. (84 U. S.) 666 . . . . . 2, 9, 14

First National Bank of Seattle v. Gidden, 175 App. Div. 563 7

General Smith, 4 Wheat. (17 U. S.) 438 . . . . . 10, 12, 13

Kimball, 3 Wall. (70 U. S.) 37 . . . . . 2, 8, 14

Kokomo Strawboard Co. v. Inman, 134 N. Y. 93 9

Leschen Rope Co. v. Mayflower G. M. & R. Co., 173 F. 855 . . . . . 2, 17, 19

Pearl, 189 F. 540 22

Phelps v. The Camilla, Taney 400, Fed. Cas. No. 11073 . . . . . 5, 18

Piedmont Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1 . . . . . 2, 12, 22

Ricou v. Fairbanks, Morse & Co., 11 F. (2) 103 . . . . 2, 22

Steamer St. Lawrence, 1 Black. (66 U. S.) 522 14

St. Jago de Cuba, 9 Wheat. (22 U. S.) 409 . . . . . 11, 12, 14

U. S. Rail Co. v. Wiener, 169 App. Div. 561 7

Winnebago, 141 F. 945 13

Statutes Cited

PAGE

Judicial Code, Sect. 240 (a) 1

Merchant Marine Act of June 23, 1910, C. 373, §1; 36 Stat. 604 (Comp. St. 1913, §§7783) 5, 11

Merchant Marine Act of June 5, 1920, C. 250, §30, sub-sect. P. & S.; 41 Stat. 1005 (46 U. S. C. A. §§971 and 974) 5, 11, 12

Negotiable Instruments Law (New York) §§3, 112 and 116 7

Reports of Opinions Below

W. A. Marshall & Co., Inc. v. S. S. "President Arthur", 22 F. (2) (D. C. S. D. N. Y.) 584 1
25 F. (2) (C. C. A. 2) 648 1

Supreme Court of the United States

October Term, 1928.

No. 272.

W. A. MARSHALL & CO., INC.,
Petitioner,
against
Steamship "PRESIDENT ARTHUR," her engines, boilers, etc.,
Respondent.

BRIEF FOR PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

This suit is by petitioner, coal suppliers of the Steamship "President Arthur," to establish a maritime lien for a portion of the purchase price of bunkers supplied that steamship. On the opinion of the District Court, Southern District of New York (22 Fed. [2d] 584), a decree was entered, dismissing the libel. This decree was affirmed by the Circuit Court of Appeals for the Second Circuit, Judge Learned Hand dissenting (25 Fed. [2d] 648), and this court granted certiorari (49 Sup. Ct. Rep. 22) pursuant to Section 240 (a) of the Judicial Code.

The grounds on which the Writ of Certiorari was sought were: that the decision below is in conflict with the applicable decisions of this court and with the decisions of Circuit Courts of Appeals for other circuits and that it nullified the Merchant Marine Acts of 1910 and 1920.

The decisions of this court with which it is believed the decision below is in conflict are:

The Kimball, 3 Wall. (70 U. S.) 37;
The Emily Souder, 17 Wall. (84 U. S.) 666;
The Bird of Paradise, 5 Wall. 72 (U. S.) 545;
Piedmont Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1.

The decisions of Circuit Courts of Appeals of other circuits with which it is believed the decision below is in conflict are:

El Amigo, 285 F. [C. C. A. 5.] 868;
Ricou v. Fairbanks Morse & Co., 11 F. (2) [C. C. A. 5.] 103;
Leschen Rope Co. v. Mayflower G. M. & R. Co., 173 F. [C. C. A. 5.] 855.

Statement.

The question in this case is whether a supplier of bunker coal for a specific vessel, when such supply is made pursuant to contract containing provisions as to terms of payment, has a maritime lien therefor.

There is no conflict in the testimony in this case as libellant's witness alone was called.

Early in 1925, the petitioner contracted with the American Palestine Line, owner of the Steamship "President Arthur," for the supply of approximately 4,150 tons of coal as bunkers for that vessel. In the negotiations for the supply, it developed that owner did not want to pay for the coal on delivery or even in thirty days, the terms usually granted. It wanted sixty days, but petitioner wanted to be in a position "to get the money at any time they wanted" (R. 9). Accordingly petitioner insisted upon trade acceptances as a means of payment so that by discounting these it might, if it desired, be put in funds prior to the day ultimately stated for payment (R. 9). Investi-

gation disclosed that owner's paper was not discountable, on account of its lack of substantial financial standing, and so acceptable indorsements were demanded in order that the trade acceptances might be readily discounted and also as "additional security." These were the sole purposes in payment by acceptances and of the indorsements thereon (R. 12, 13).

Two contracts, dated February 18, 1925, and March 4, 1925, respectively, resulted from these negotiations. The terms of payment provided therein were as follows:

> "The buyer will pay for the said coal as follows:
>
> (1) By delivering to the Seller a trade acceptance drawn by it in favor of the Seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.
>
> (2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal, harbor barge freight and insurance on coal while in barges, which acceptance is also to be endorsed by the said Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb" (R. 15, 17).

The coal was delivered and the acceptances given (R. 8, 11). The first acceptance, for an amount equal to the railroad freight on the coal delivered under both contracts, was paid at maturity (R. 11). The second acceptance, for the balance due under both contracts, was not and never has been paid (R. 22).

The libel herein for the unpaid balance of the purchase price was filed and the "President Arthur" arrested May 11, 1925 (R. 1). A civil action upon the unpaid acceptance, but against the indorsers only, was commenced in

the state court June 18, 1925, and is still pending and undetermined (R. 5, 12). Respondent offered in evidence two affidavits submitted by petitioner on a motion for summary judgment in such civil action (Claimant's Exhibits C and D, R. 20-25), in which affidavits the indorsement of the acceptance by the individuals there sued was stated to have been "part of the consideration" for the sale of the coal (R. 22, 24).

Both the District Court and the Circuit Court of Appeals have dismissed the libel.

The primary ground of decision of the District Court is that as the contract required payment coincidentally with the delivery of the coal by delivery of trade acceptances of the owner, bearing three indorsements, fulfillment of this requirement was payment and hence no lien could arise (R. 27).

The grounds of decision of the Circuit Court of Appeals, to which a dissenting opinion was written by Judge Learned Hand, may be summarized as follows:

First: "Where parties agree to an express contract as to payment" [even though this be by notes of the original debtor] "the contract becomes extinguished by full performance" [that is by the mere giving of the notes even though they be not paid at maturity] "and so it is impossible that either party should have any claim against the other arising out of the contract" (Opinion, R. 33).

Second: Cash was not contracted for, but a payment other than cash was provided by the contract, hence "* * * If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and

to waive his lien, unless he stipulates that the liability of the vessel shall still continue. Phelps v. The Camilla, Taney 400, Fed. Cas. No. 11073 (Md. 1838) : '" (Opinion, R. 32).

Third : The Merchant Marine Act of 1920, which provides that to support a lien "it shall not be necessary to allege or prove that credit was given to the vessel," provides also that nothing in that act shall prevent the furnisher of supplies from waiving his right to a lien by agreement or otherwise. The right to the lien may be displaced "by the insertion of some stipulation wholly incompatible or irreconcilable with the existence of such a right." Requiring indorsements of owner's acceptances was such a stipulation; *ergo* "the appellant relied solely upon the indorsement and not upon the maritime lien" (Opinion, R. 32, 34).

Summary of Argument.

An "acceptance" is in effect a note, the acceptor being primarily liable as is the maker of a note. By both the commercial and maritime law the note of the original debtor, even when given pursuant to contract provision, is but an additional promise to pay. It is everywhere treated as conditional payment merely. Accordingly, until such note is paid, it can not discharge the original obligation. The Circuit Court of Appeals disregarded these principles and its decision is in conflict with applicable decisions of this court (Point I, *infra*, p. 6).

The Maritime Lien Act of 1910, which in respect of the point involved here was not substantially changed by the Act of 1920, settled the confusion arising through early decisions of this court and gave to the supplier on owner's order a maritime lien. He need not allege or prove he relied on the credit of the vessel. The lien is presumed and this presumption can be destroyed only by clear and affirmative proof of waiver by the party that alleges it (Point II, *infra*, p. 10).

The mere fact that owner's notes were taken does not waive the lien nor does a provision in the contract for payment by owner's notes waive the lien. The Circuit Court of Appeals held to the contrary and its decision is in conflict with applicable decisions of this court and of the Circuit Court of Appeals for the Eighth Circuit. So too, the requirement of indorsements of owner's notes not being incompatible or irreconcilable with the existence of the lien did not waive it. The Circuit Court of Appeals for the Fifth Circuit has held that maritime liens are not waived by taking other security. With these decisions, the decision below is in conflict (Point III, *infra*, p. 14).

POINT I.

The note (the acceptance) of the owner, even when received under the contract, is not such payment as to satisfy and terminate the original obligation unless the note itself be paid.

The first question is obviously whether the "acceptances," given and received pursuant to the contract, were such payment as to discharge the debt for if so either no lien arose or was forthwith discharged whatever might be its character.

The terms of the contract in respect of payment appear at page 3 of this brief. It is there provided that payment shall be made by means of the drafts of the seller, accepted by the buyer and indorsed by three named parties. This form of paper, even when unindorsed, is known as a "trade acceptance."

The use of the "trade acceptance" has been revived in this country in recent years and its usage has become increasingly common through the establishment of the Federal Reserve Bank. It is a recognized form of *promise to*

pay. It serves two important purposes. *First,* it fixes the amount of the debt. *Second,* it makes it possible for the seller, through its discount, to have the use of the funds prior to the day stated for payment. The discountability of the paper depends in a large measure upon the credit standing of the acceptor. If this is not good, the paper is not readily discountable unless it be strengthened, as in this instance, by indorsements.

The rights and obligations of parties to a trade acceptance are covered by the New York Negotiable Instruments Law. Section 112 provides:

> "The acceptor by accepting the instrument acknowledges that he will pay it according to the tenor of his acceptance; • • •."

Upon acceptance a draft becomes in effect a promissory note. The acceptor stands in the place of the maker of a note and is "primarily" liable (United States Rail Co. v. Weiner, et al., 169 App. Div. 561). All other parties are "secondarily" liable (Neg. Inst. Law, §3).

> "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, • • •" (Neg. Inst. Law, §113).
>
> "Every indorser who indorses without qualification, • • • engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, • • •" (Neg. Inst. Law, §116).

Nowhere in the law is the maker of a note, or acceptor of a draft relieved of his "primary" obligation by reason of any indorsements, nor even when collateral is given to secure its payment (First National Bank of Seattle v. Gidden, 175 App. Div. 563).

The original debtor, the acceptor of the seller's drafts, became liable upon delivery of the coal, remained liable by delivery of the "acceptances" and continued liable upon the non-payment of either of them. There was no substitution of one debtor for another, or novation, either by express agreement or presumption of law, as in those cases where the note of a third party alone is given at the time of the creation of the debt. By indorsement of the "acceptances" the three named parties assumed a liability but it was in addition to as well as different from that of the acceptor. Their liability was in respect of the "acceptances" alone, while the acceptor's liability was upon non-payment, at the election of the seller, either on the "acceptances" or in assumpsit under the contract for the value of the coal delivered.

By both the law commercial and the law maritime the taking of debtor's note, whether or not apart from written contract, does not satisfy and terminate the original obligation.

> "By the general commercial law, as well of England as of the United States, *a promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties;* it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt. *The acceptance of the note is considered as accompanied with the condition of its payment.*" (Italics ours.)
>
> *The Kimball*, 3 Wall. (70 U. S.) 37, 45.

> "The drafts given by the captain upon the owners of the vessel in New York were not received by the libellants in discharge and satisfaction of the sums advanced. They were received only as conditional payment. Such would be the presumption of law in

the absence of any direct evidence on the point. For by the general commercial law of the world, a promise to pay, whether in the form of notes or bills, is not of itself the equivalent of payment: it is treated everywhere, in the absence of express agreement or local usage to the contrary, as conditional payment only. On principle, nothing can be payment in fact except what is in truth such, unless specially agreed to be taken as its equivalent."

The Emily Souder, 17 Wall. (84 U. S.) 666, 670.

There is "no local usage to the contrary" in New York, where the effect of the provision of a contract for payment by delivery of purchaser's acceptances has been held to be a mere extension of the time of payment, and that upon default in payment of the acceptances the seller may treat the contract as terminated and sue for the value of the goods furnished (*Kokomo Strawboard Co.* v. *Inman, et al.*, 134 N. Y. 93).

In the case of *The Bird of Paradise*, 5 Wall. (72 U. S.) 545, the contract provided "the freight to be paid in Liverpool * * *, one fourth in cash, one fourth by acceptance of charterer at six months from the final sailing of the vessel and the remainder by like bill, at three months from delivery, etc." The cash was paid on loading and the first of the two acceptances was given but not paid. Mr. Justice Clifford, in giving the decision of this court, referring to the acceptance given but unpaid, stated at page 561:

"Payment of that instalment of the freight is not proved, * * *. Ship-owner under the circumstances has a right to stand upon the original contract and to seek his remedy to that extent of his claim in the form to which it originally belonged as fully as if the acceptance had never been given."

The Decision of the Circuit Court of Appeals, is in Conflict with the Applicable Decisions of the Court.

This court has thus repeatedly held that the essence is the payment of the money for which the note of the buyer is merely another promise. Such was the instant case, although both courts below held that everything for which the seller had contracted was given in payment and hence the acceptances themselves were payment. They followed the doctrine of those cases where the note of a third party alone was taken in payment. There was no agreement here, express or implied, to relieve the owner of its obligation. On the contrary, it was expressly held liable both by the contract and the "acceptances."

In every case where the note has been presumed to be payment, except where the Massachusetts doctrine prevails, the note has been that of a third party alone and so by a substitution of one debtor for another the original debtor has been relieved from liability. That a novation shall have taken place is essential to this doctrine.

On both principle and authority the notes of the original debtor does not discharge the original obligation, yet both courts below, have disregarded the cited principles of this court and their decisions here are in direct conflict with the foregoing applicable decisions of this court.

POINT II.

By the maritime law one furnishing supplies has a maritime lien therefor.

Prior to the Maritime Lien Act of 1910, there was a very considerable confusion in the law relating to a materialman's lien on vessels. Difficulties and anomalies arose through two early cases decided by this court: *The General Smith*, 4 Wheat. (17 U. S.), 438, decided in 1819, and

The St. Jago de Cuba, 9 Wheat. (22 U. S.), 409, decided in 1824. In the former case Mr. Justice Story held that the maritime law gave a lien for necessaries to a foreign ship or to a ship in the port of the State to which she did not belong, but where the necessaries were furnished in the port or the state to which the ship belonged, the case was governed entirely and solely by the local state lien statutes. In the latter case, Mr. Justice Johnson declared (1) that it was not in the power of any one except the master,—not even the owner himself,—to give implied liens on a vessel; and (2) that when the owner is present "the contract is inferred to be with the owner himself on his ordinary responsibility, without a view to the vessel as the fund, from which compensation is to be derived." Thus the doctrine of presumption of credit to the owner was established in our law.

Since those cases, the courts have been ingenious either to follow or to avoid, by differentiation, their doctrines. As there seemed to be no way of harmonizing the many and varying decisions and of undoing the evils arising from those early cases except through Act of Congress, its aid was sought. Then finally, after repeated efforts, Congress passed the Maritime Lien Act of 1910, C. 373, §1; 36 Stat. 604; Comp. St. 1913, §7783.

The Act of Congress of June 5th, 1920, C. 250, §30, sub sect. P & S; 41 Stat. 1005; 46 U. S. C. A. §§971 and 974, does not differ materially, and so far as concerns the case at bar is similar in all respects to the Maritime Lien Act of June 23, 1910. Section P of the present Act is as follows:

> "Any person furnishing repairs, supplies, towage, use of drydock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and

it shall not be necessary to allege or prove that credit was given to the vessel."

Under Sub-section 8 of the Statute this lien may be waived; the material part of that Sub-section being as follows:

"Nothing in this section shall be construed to prevent the furnisher of repairs, supplies * * * from waiving his right to a lien * * * at any time, by agreement or otherwise."

The Maritime Lien Act Settled the Confusion in the Law and Accorded the Supplier a Lien the Relinquishment of Which Can be Established Only by Clear and Affirmative Proof of Waiver.

Mr. Justice Brandeis in *The Piedmont Coal Co.* case, 254 U. S. 1 (decided in 1920), after referring to the Reports of the Committees of Congress (Senate Report No. 831, 61st Cong., 2nd sess.), says at page 11:

"Those reports state that the purpose of the act was this: *First*, to do away with the artificial distinction by which a maritime lien was given for supplies furnished to a vessel in a port of a foreign country or state, but denied where the supplies were furnished in the home port or state. *The General Smith*, 4 Wheat. 438. *Second*, to do away with the doctrine that, when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence, no lien arises. *The St. Jago de Cuba*, 9 Wheat. 409. *Third*, to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and other necessaries. *Peyroux v. Howard*, 7 Pet. 324."

And in the same case it was stated at page 10:

"A vessel may be made liable *in rem* for supplies, although the owner can be made liable therefor *in personam;* since the dealer may rely upon the credit of both. *The Bronx,* 246 Fed. 809."

Since the Act gives to the supplier a maritime lien unless he has *waived such by express agreement or otherwise,* it is a matter for the respondent to establish such waiver by clear affirmative evidence.

Judge Hough has stated the law as follows:

"* * * *the lien is presumed on proof of due delivery on request of lawful supplies, until such presumption is destroyed by affirmative proof of agreement that the promising party was to be exclusively liable for payment.* 'The Havana', 64 Fed. 496, 12 C. C. A. 361; 'The Yankee', 233 Fed. 919, 147 C. C. A. 593; 'The Oceana' (C. C. A. 2d, Oct. T., 1916), 244 Fed. 80." (Italics ours.)

The Bronx, 246 Fed. (C. C. A. 2), 809, 810.

In the Sixth Circuit the rule has been stated as follows:

"The statute declares a lien in favor of the party furnishing material for the building of the ship. But it does not contemplate that credit shall not be given to the owner, or that he shall not be liable personally for the debt. It is possible, no doubt, for the furnisher to waive the lien; but, unless he does so, the lien exists. *The burden of showing the waiver rests upon the party who alleges it.*" (Italics ours.)

The Winnebago, 141 Fed. (C. C. A. 6), 945, 950.

No longer is the materialmen relegated to the local lien statute when the vessel is in the home port (*The General Smith, supra*). No longer is there a presumption that the supplier dealt on the credit of the owner, when he is pres-

ent, without a view to the vessel as a fund (*The St. Jago de Cuba, supra*). By the statute, the supplier, on order of owner, is presumed to have a lien and may hold the owner *in personam* as well. Such presumption can be destroyed only by clear and affirmative proof of waiver by the party that alleges it.

POINT III.

Petitioner has not waived its right to a maritime lien by agreement or otherwise.

The mere fact that owner's notes were taken would not of itself serve to discharge the lien.

> "The remaining question is, has this lien been forfeited or waived? It does not appear to have been forfeited or waived under any provision in the New York Statute, *nor was it waived upon the principles of maritime law by the acceptance of Graham's notes, unless the claimants can show that the libellants agreed to receive them in lieu of and in place of their original claim.*" (Italics ours.)
>
> *The Steamer St. Lawrence*, 1 Black (66 U. S.) 522, 531-532.

See also:

> *The Kimball*, 3 Wall. (70 U. S.) 37, *supra*;
> *The Emily Souder*, 17 Wall. (84 U. S.) 666, *supra*.

Accordingly, petitioner must have waived its lien, if waived at all, not by the mere taking of the "acceptances" but by the agreement contained in the contract itself to take those "acceptances" or by the requirement of the indorsements thereon, no matter for what purpose it required those indorsements.

The Stipulation of the Contract for Payment by Owners "Acceptances" Does Not Waive the Maritime Lien.

The Bird of Paradise, 5 Wall. (72 U. S.) 545, *supra*, decided not only that the taking of the debtor's acceptance, pursuant to contract, did not discharge the debt but also that it did not waive the maritime lien of the owner for freight.

In that case the charter was for the shipment of a cargo of coal from Liverpool to San Francisco and provided for the payment of freight as follows:

> "The freight to be paid in Liverpool, on unloading and right delivery of the cargo, one-fourth in cash, one-fourth by the acceptance of Eccles, the charterer, at six months from the final sailing of the vessel, and the remainder by like bill, at three months from delivery, at charterer's office in Liverpool, of certificate of right delivery of cargo agreeably to bills of lading, or in cash, less five per cent., at freighter's option. The vessel to be addressed to the freighter's agent abroad. £500 to be advanced in cash at the port of discharge on account of the freight. The ship and her freight are bound to this venture" (p. 546).

Upon loading charterer paid one-fourth freight in cash, and gave his acceptance for a second fourth at six months thereafter. The voyage took eight months and ten days. Before the vessel arrived at San Francisco the charterer became bankrupt and the "acceptance" for the second fourth of the freight was dishonored. On arrival at San Francisco, the £500 agreed to be advanced in cash was paid by freighter's agent; but the final "acceptance" for the residue of freight was not given. The freighter's agents libelled the cargo and secured possession by decree of the District Court.

> "Ship-owners, unquestionably, as a general rule, have a lien upon the cargo for the freight, and conse-

quently may retain the goods after the arrival of the ship at the port of destination until the payment is made, unless there is some stipulation in the charter-party or bill of lading inconsistent with such right of retention, and which displaces the lien" (p. 554).

"Such a lien is regarded in the jurisprudence of the United States as a maritime lien, because it arises from the usages of commerce, independently of the agreement of the parties, and not from any statutory regulations. * * * Parties, however, may frame their contract of affreightment as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it, or they may so frame their contract as to exclude it altogether (p. 555).

"Unless, however, the special agreement is absolutely inconsistent with the retention of the goods, the waiver or displacement is not shown, and the right remains" (p. 558).

"Agreement of the parties filed in the case and made a part of the record, shows that the acceptance was presented to the bankrupt court, and that it has never been paid, and it is not pretended that it is of any value. * * * *Payment of that installment of the freight therefore is not proved*, and there is no evidence in the record tending to show that the lien for that instalment of the freight was ever waived. *Ship-owner under the circumstances has a right to stand upon the original contract and to seek his remedy to that extent of his claim in the form to which it originally belonged as fully as if the acceptance had never been given.*" (Italics ours.) (P. 561).

This case is identical with the one at hand in that in each the agreement provides the debt is to be paid by notes. In *The Bird of Paradise*, *supra*, the contract expressly provided for payment of the second fourth of the freight

by charterer's "acceptance" at six months and it was expressly held that the delivery and receipt of this acceptance by the owner did not constitute payment of the debt or a waiver of the lien for freight; as the voyage took eight months and ten days it must have been within the contemplation of the parties that the draft would be paid before the vessel arrived and its cargo delivered. This court held the ship-owner was entitled to hold the cargo until the amount represented by this draft, which was dishonored, was paid.

The court held, however, that as the last draft was not to be paid until three months from delivery at charterer's office in Liverpool of certificate of right delivery of cargo, the parties contemplated a delivery of the cargo prior to the maturity of that draft and to the extent of that draft owner had waived its lien.

A similar result was reached by the Circuit Court of Appeals for the Eighth Circuit in *Leschen & Sons Rope Co.* v. *Mayflower G. M. & R. Co.*, 173 F. (C. C. A. 8) 855. The contract there provided for delivery of certain materials, buyer to pay part cash on signing the contract, a further installment on delivery of the materials, and the final amount "to be paid by your note at sixty (60) days * * * not later than sixty (60) days from arrival of last shipment." The contract further provided title and ownership should remain in the seller and that it might retake possession "in default of the last payment being made." The note was given but was dishonored. Seller brought replevin but the action was dismissed by the District Court, on the ground that the Mayflower Company had made the last payment in accordance with the terms of the contract even though the note itself was not paid. Circuit Judge Sanborn, in rendering the opinion of the appellate court, reached the conclusion that the seller's security was not released.

> "Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is

doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract (p. 857).

Where the extinguishment of a debt has the effect to strike down a lien or a title securing its payment, the presumption that it is not discharged by the acceptance of the note of the debtor in payment of it is strengthened, because in such a case the discharge of a lien is more unusual and unreasonable. The Kimball, 3 Wall., 37, 45, 18 L. Ed., 50; Sweet & Carpenter v. James, 2 R. I., 270, 294, 297; "The Bird of Paradise", 5 Wall., 545, 18 L. Ed., 662 (p. 858).

* * * *it is only when there is a clear agreement by the creditor that the note of the debtor shall discharge the debt and that the creditor will take the risk of the payment of the note, or an indubitable intention of the parties to that effect, that a creditor's acceptance of such a note extinguishes the debt or releases its security* * * *." (Italics ours.) (P. 859.)

The Decision of the Circuit Court of Appeals in Respect of Waiver by Stipulation for Notes is in Conflict with Decisions of this Court and the Circuit Court of Appeals for the Eighth Circuit.

In its decision, the court below, quoting *Phelps* v. *The Camilla*, Taney 400 Fed. Cas. No. 11073, said in substance:

"If the party does not choose to rely on the contract which the maritime law implies in such case, but takes an express written contract, he must rely on the con-

> tract he makes for himself, * * * and if he takes a note or bill of exchange * * * he is presumed to rely on that security and to waive his lien, * * *" (R. 32).

In *The Bird of Paradise, supra,* we had both a special written contract providing how payment should be made and the acceptance of a note thereunder yet this court held the lien not waived. There is an irreconcilable conflict between that case and the case at bar.

And again the court below said: "No lien can exist in favor of the material man when he receives in payment that for which he stipulated when the contract was made." In the *Læschen Rope Co.*, case, *supra,* the security for the last payment was that of title given by the contract. In the instant case the statute says the supplier shall have a lien (but that it may be waived). This provision of the statute is as much a part of the contract as though written into it by the parties. In the *Læschen Rope Co.*, case it was held that the security was not waived or released by the contract and the accepting of the note thereunder. This brings these two decisions, the one in the 2nd Circuit and the other in the 8th Circuit, in direct conflict. The one in the 8th Circuit follows the previously cited decisions of this court.

The Stipulation of the Contract Requiring Indorsement of Owners "Acceptances" Did Not Waive the Maritime Lien.

The court below considered the requirement of the three individual indorsements which, in an affidavit used in its civil suit, petitioner stated was "*part* of the consideration of the sale" and that without the consideration of such indorsement "it never would have sold the coal," as being a stipulation coming within the rule stated by this court in *The Bird of Paradise, supra* (R. 32, 34). The language of that rule, appearing at page 555, is as follows:

> "Presumption is in favor of the lien, as already explained, but it may be modified, or it may be excluded or displaced by direct words, or by the insertion of some stipulation wholly incompatible or irreconcilable with the existence of such a right * * *."

As a matter of mere application of this rule, without any precedent whatsoever, it is impossible to see how the court could have reached any such conclusion. There are no "direct words" in the contract that displace or exclude the lien the statute gives. There is no "stipulation wholly incompatible or irreconcilable with the existence" of the lien—as in the case of the final acceptance in *The Bird of Paradise*, supra, which was not payable until after the freight lien must have been discharged by delivery of the cargo. The security of the lien and the security of the indorsements may exist side by side without conflict and without affecting the equities of other creditors of the vessel.

Nor does the evidence strengthen the conclusion of the lower court.

The indorsements were there stated to be only "*part* of the consideration." Quaere: What was the rest? Not the "acceptances" themselves for they were but another promise of the *original debtor* to pay. Obviously it must have been the lien on the vessel which the law conferred. This lien could not be taken to the bank and used as collateral and neither could the owner's un-indorsed "acceptances." Petitioner "wanted to get trade acceptances in order to get the money at any time they wanted—in fact to discount that paper" (R. 9).

The conclusion of the court below is based on inference. This was not only unsound but is contrary to the presumption created by the Maritime Lien Act. Judge Hough in that same Circuit said in *The Bronx*, 246 F. (C. C. A. 2) 809, 810, the lien is presumed

> "Until such presumption is destroyed by affirmative proof that the promising party was to be exclusively liable for payment."

The analogy of the facts in that case with those of the instant case is exact. In that case "Wolfe, an officer of alleged owner, agreed with libellant that either he or the owner would pay for the supplies in question." The promise of Wolfe was no different in effect from the indorsements: each was security for the obligation of the original debtor. Judge Hough allowed the lien.

This Decision of the Circuit Court of Appeals is in Conflict with the Decisions of the Circuit Courts of Appeals for the 5th Circuit, Which Support the Lien.

In *El Amigo*, 285 F. (C. C. A. 5) 868, the City of Houston took the bond with surety of one Miller, who seemed to be the one in whom was the management of the vessel at that port. This bond was to secure "all dockage and other charges accruing in favor of the City from ships operated by Miller." In that case the court held, at pages 870, 871:

> "• • • The terms of the bond do not indicate that the acceptance of it was intended to have the effect of waiving, releasing, or discharging any lien the city might acquire. There was no evidence that the city consented to give up its lien, or that the bond was accepted in lieu of claims which might arise in the city's favor for wharfage, etc. That being so, the city's acceptance of the bond did not deprive it of its lien."

Again in that same Circuit it was held that a reservation of title to machinery supplied to a vessel did not operate as a waiver of the lien:

"• • • Furthermore, the libel showed that the equipment covered by the written contract was furnished by the appellee to the boat on the order of its owner. The retention by contract of the title to such equipment as security for the purchase price was not inconsistent with the existence of the lien given by the statute, and did not prevent the appellee from asserting that lien."

Ricou v. Fairbanks, Morse & Co., 11 F. (2) (C. C. A. 5) 103, 104, 105.

To the same effect as the last case are those of *The E-2*, 16 F. (2) (D. C. Mass.) 1005, and *The Pearl*, 189 F. (D. C. No. Car.) 540.

None of the foregoing decisions can be reconciled with the decision below. In no instance was any mention made of retention of security of the vessel, and in each case other security was provided by agreement made prior to incurring the debt. The decisions of the 2nd and 5th Circuits are clearly in conflict with one another as is this instant decision of the 2nd Circuit with its earlier decision in *The Bronx*, *supra*. The decision in *The Bronx* has already received the approval of this court in *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 10, *supra*.

Conclusion.

It is submitted that the petitioner has established its right to a lien which respondent has not shown by clear and affirmative proof to have been relinquished and that accordingly the decrees below should be reversed and the cause remanded with directions for a decree in favor of the petitioner for the full amount of its claim, $9,382.60, with interest from March 6, 1925, with costs.

Respectfully,

GEORGE WRIGHT HINCKLEY,
For the Petitioner.

No. 373.

Supreme Court of the United States

OCTOBER TERM, 1926

W. A. MARSHALL & CO., INC., *Petitioner*,

v.

AMERICAN PALESTINE LINE, INC., Claimant of the STEAMSHIP "PRESIDENT ARTHUR", her Engines, Boilers, etc., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN M. WOOLSEY,
CHAUNCEY B. TREADWELL,
WM. J. HUGHES,
Counsel.

Printed in the United States by S. H. Tyson, Printer, 404 Pearl Street, New York.

INDEX.

	PAGE
Opinion below	1
Jurisdiction of this Court	2
Question presented	2
Statement	2
Argument	6
1. Only a question of fact is presented.	6
2. Contract precludes other method of payment	8
3. No conflict of decision with this Court	9
4. Decision does not affect Merchant Marine Acts	10
5. No conflict with other Circuit Courts of Appeals	11
6. Petitioner has confused cases of endorsed and unendorsed notes	12
Conclusion	14

AUTHORITIES CITED.

	PAGE
Atlas S. S. Co. *v.* Colombian Land Co., 102 Fed. 358	13
Dibble *v.* Richardson, 171 N. Y. 131, 138	13
Ely *v.* Murray, 200 Fed. 368	10
Federal Trade Commission *v.* American Tobacco Company, 274 U. S. 543	7
Hall *v.* Stevens, 116 N. Y. 201, 207	13
"The Illinois", Fed. Case 7,005	13
"The James J. Furber", 129 Fed. 808, 813	13
Murray *v.* Lazarus, 1 Paine, 572, 577	14
Phelps *v.* Camilla, Fed. Case 11,073	8, 12
Segrist *v.* Crabtree, 131 U. S. 287, 289	14
Sheehy *v.* Mandeville, 10 U. S. (6 Cranch) 253, 264	14
Southern Power Company *v.* North Carolina Public Service Company, 263 U. S. 508	7
Taylor *v.* Commonwealth, Fed. Case 13,787	13
United States *v.* Johnston, 268 U. S. 220	7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 272

W. A. MARSHALL & CO., INC.,
Petitioner,

v.

AMERICAN PALESTINE LINE, INC., claimant of the STEAMSHIP "PRESIDENT ARTHUR", her Engines, Boilers, etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the District Court may be found at pages 35-38 of the record. It is reported in 22 Fed. (2nd), p. 584.

The opinion of the Circuit Court of Appeals, affirming the opinion of the District Court, is reported in 25 Fed. (2nd), p. 648.

Jurisdiction of This Court.

The judgment sought to be reviewed was entered April 16th, 1928. Petition for Writ of Certiorari was filed on July 14th, 1928.

The jurisdiction of this Court to issue the writ prayed for is conferred by the Act of February 13th, 1925.

Question Presented.

Petitioner contends that the decision below is contrary to the decisions of this Court relative to what constitutes "payment" and as to when the taking of a note or trade acceptance constitutes the waiver of a maritime lien. It is also claimed by petitioner that the decision below is in conflict with the decisions of other Circuit Courts of Appeals.

Respondent sees no conflict between the decision below and the decisions of this Court or other Circuit Courts of Appeal, any apparent conflict being a mere difference in decision because based upon different facts. The decision below involves no question of great public importance and is concerned solely with a question of fact, which question has been twice decided in respondent's favor.

Statement.

Respondent conceives the decision below involves nothing but a question of fact and hence we must state the facts.

The question below was whether a maritime lien existed against the S.S. "President Arthur", on account of coal delivered for the vessel's use by petitioner pursuant to two written contracts. Respondent's position was that these contracts represented the entire agreement between the parties and that the coal was not furnished upon the credit of the ship.

The terms of payment provided in these contracts are as follows:

> "The Buyer shall *pay* for the said coal as follows:
>
> "(1) By delivering to the Seller a trade acceptance drawn by it in favor of the Seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be endorsed by JACOB WACHT, JACOB S. STRAHL, and JOSEPH W. GOTTLIEB.
>
> "(2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal, harbor barge freight, and insurance on coal while in barges, which acceptance is also to be endorsed by the said JACOB WACHT, JACOB S. STRAHL, and JOSEPH W. GOTTLIEB.
>
> "THE ENTIRE CONTRACT BETWEEN THE PARTIES IS STATED ABOVE, AND THERE IS NO OUTSIDE CONDITION, WARRANTY, AGREEMENT OR UNDERSTANDING." (Rec., 24)

After the signatures to the contract is the following:

> "In consideration of the execution of the foregoing contract, and of the delivery of said coal by the Seller to the Buyer, and in con-

sideration of One Dollar ($1.00) paid to each of the undersigned, the receipt of which is hereby acknowledged, we jointly and severally agree to endorse the said trade acceptance described in the foregoing contract between the Seller and the Buyer."

The coal was delivered and the first acceptance, for freight, was paid. (Rec., p. 19.) The second acceptance for a balance of $9,382.62 was not paid. (Rec., p. 19.) A civil action by petitioner for this amount against the endorsers, Joseph W. Gottlieb, Jacob Wacht and Jacob S. Strahl, is now pending in the New York State Courts. (Rec., p. 28.)

The ground of decision by the District Court and by the Circuit Court of Appeals was simply that, upon the facts shown, the contract between petitioner and respondent represented their entire agreement and that this contract did not contemplate holding the ship for the coal furnished.

The facts were as follows:

The contract for the sale of the coal was negotiated by the respondent with Mr. Sandford, Sales Manager of petitioner. (Rec., p. 29.) The Palestine Line wanted more than thirty (30) days for payment. (Rec., p. 14.) Mr. Sandford testified that this made the coal company suspicious and they looked further into the Palestine Line's financial standing and came to the conclusion that they did not like the account but wanted trade acceptances so that the coal company could get the money at any time by discounting them. (Rec., p. 14.) When trade acceptances were mentioned the coal company stated it wanted additional security as they were not satisfied as to the credit of the Palestine Line. (Rec., p. 14.) Sandford wrote the Palestine Line a letter which said:

"*Regarding terms of payment*, we would require a trade acceptance payable on March

> 10th for the freight and boat freight which would amount to $3.04 per gross ton, and an additional trade acceptance for the balance, amounting to $2.06 per gross ton; *these trade acceptances to be endorsed by responsible persons acceptable to us*". (Italics ours) (Rec., p. 26.)

The individuals who were acceptable to the coal company were Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb, who were investigated by the coal company's Credit Department (Rec., p. 16). Affidavits filed in the State Court by petitioner and submitted in evidence in this proceeding show that without the endorsements of the three individuals the coal company would never have sold the coal to the Palestine Line. (Rec., p. 32.) In the affidavit of Sandford he referred to the provision of the contract relative to the three endorsers as "one of the essential terms of the offer." (Rec., p. 29.) He quoted for the benefit of the Court four significant parts of the contract and among them listed the endorsements of the three individuals "*as part of the consideration of the sale of said coal*". He referred to these endorsers not as accommodation endorsers, but as straight endorsers "*for without the consideration of such endorsements, the plaintiff would never have sold the coal to American-Palestine Line, Inc.*" A further affidavit showed that the sale was made "only on condition that the trade acceptances to be given in payment would be signed by three endorsers acceptable to the plaintiff" and that the endorsement of these individuals "was an essential prerequisite for the purchase of this coal". (Rec., p. 34.) In addition to the above the contract itself recites that there was "no outside condition, warranty, agreement or understanding."

The issue is, did anything remain to be done by claimant after the giving of the trade acceptances so far as the contract itself was concerned? If not, and it seems to us elementary that there was not, the obligations of the claimant under the contract were completed, the coal was paid for, and, being paid for, no lien could exist.

ARGUMENT

I.

Only a question of fact is presented.

Upon the facts above stated the District Court, Judge Thacher, held that the contract between the parties was conclusive and that as it provided for payment upon the date of delivery of the coal, the said payment to take the form of trade acceptances endorsed by three individuals, payment was made when such acceptances, so endorsed, were delivered on that date. Hence, no maritime lien could arise because the coal was paid for, within the meaning of the contract, upon the date of delivery of the acceptances.

The Circuit Court of Appeals in affirming, after reciting the facts above mentioned, held that the written contract between the parties provided the sole terms of payment, that such terms consisted of trade acceptances with three individual endorsers and that when such acceptances were delivered, the transaction was complete. The Court held that cash was not delivered because the contract provided otherwise. The Court further held that there was nothing in the Merchant Marine Act of 1920 which prevented parties making a contract

which did not contemplate holding a ship for supplies furnished. The Court said:

> "Where parties agree to an express contract as to payment, the contract becomes extinguished by full performance and so it is impossible that either party should have any claim against the other arising out of the contract. No lien can exist in favor of the materialman when he receives in payment that for which he stipulated when the contract was made."

The case, therefore, narrows down to a question of fact, i.e., whether the parties intended by their agreement to state the terms, and the sole terms, upon which they would deal with each other, or whether aside from the agreement, one party could rely upon a maritime lien against the ship. This question of fact, as before noted, was resolved in favor of respondent by the District Court, and the District Court's decision was affirmed by the Circuit Court of Appeals.

This Court has frequently said it will not issue certiorari to discuss facts. (*Southern Power Company* v. *North Carol. Public Service Company*, 263 U. S. 508; *United States* v. *Johnston*, 268 U. S. 220; *Federal Trade Commission* v. *American Tobacco Company*, 274 U. S. 543. In the last named case Mr. Justice McReynolds said:

> "Proper decision of the controversy depends upon a question of fact. • • •
>
> "It now appears to us that this matter of fact is of no general importance. Accordingly, we adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations. And upon that ground alone we affirm the judgment below."

II.

The contract, by its terms, precludes any other method of payment than therein provided.

The contract, after providing specific terms of payment, i.e., by endorsed trade acceptances, states:

> "The entire contract between the parties is stated above, and there is no outside condition, warranty, agreement, or understanding."

These words have only one possible meaning; that the contract just made is the entire agreement between the parties, which precludes the possibility that the coal company could validly reserve a right to obtain payment in any other form than as provided in the contract, i.e., by endorsed trade acceptances. The contract is, therefore, complete and payment within its meaning was made, when such endorsed trade acceptances were delivered. As Mr. Justice Taney said in *Phelps* v. *Camilla*, Fed. Cases No. 11,073:

> • • • "If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue."

The effort of the coal company to obtain payment in cash by proceeding against the ship is therefore clearly at variance with the terms of the contract.

III.

There is no conflict of decision.

Petitioner claims the present decision is in conflict with that of this Court in *The Emily Souder*, 17 Wall (84 U. S.) 666 and *The Bird of Paradise*, 5 Wall (72 U. S.) 545.

The first case may be dismissed with the statement that repairs were made and credit extended in a *foreign port*. It always has been the rule that in such cases credit is presumed to be extended to the ship for the reason that the financial standing of the owners is, naturally, unknown and this is true whether or not notes, drafts or other evidences of the debt are given.

In *The Bird of Paradise* a freight lien, not a maritime lien, was involved. Two trade acceptances were to be given as payment. After delivery of the first the charterer failed in business and the second trade acceptance was never even tendered. The acceptances were signed by the charterer and were unindorsed. Obviously the lien existed, but this case is in no way analogous to the present.

IV.

The decision below has no effect upon the Merchant Marine Acts of 1910 and 1920.

Petitioner has alleged as one of the reasons why its petition should be granted that the decision below nullifies the provisions of the Merchant Marine Acts of 1910 and 1920 to the effect that the burden of proof is not upon the materialman to show that he supplied his materials upon the credit of the ship. It is sufficient to say that the Merchant Marine Act of 1920 provides (C. 250, Subsec. S. 41, Stats. 1005):

> "Nothing in this section shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise."

As the Court below said, nothing in the Act bars proof that whatever was furnished was furnished on the credit of the owner or a third party and in no sense upon the credit of the ship (*Ely* v. *Murray*, 200 Fed. 368).

It certainly cannot be contended that the Merchant Marine Acts *require* parties to contract with each other upon the credit of the ship. They have their ordinary constitutional right to make such contracts as they choose. The present contract, clear and precise as to its terms of payment, is a case in point.

V.

The decision below is not in conflict with decisions of other Circuit Courts of Appeals.

Petitioner cites on this point *El Amigo*, 285 Fed. 868 and *Ricou* v. *Fairbanks Morse Co.*, 11 Fed. (2nd) 103.

In the first case a charter party provided that a bond should be given to indemnify the owner against any claims against the vessel. Supplies were furnished the ship and the case narrowed down to whether the furnisher of supplies was aware that the charterer could not bind the ship. There was no question of construction of the contract involved.

In *Ricou* v. *Fairbanks Morse Co.* the question was whether the thing libeled was a vessel or an uncompleted structure, and whether retention of title by the owner of equipment furnished was inconsistent with the existence of a maritime lien.

The last case cited was *Leschen Rope Co.* v. *Mayflower G. M. & R. Co.*, 173 Fed. 855. This case involved a mechanics lien and an unindorsed note. The difference between mechanics liens and maritime liens has already been noticed by this Court. There is nothing in the case conflicting with the decision below.

It is true that Judge Learned Hand, in his dissenting opinion, construed the Merchant Marine Act differently from the majority of the Court, but he had to adopt such construction after determining that the giving of the endorsed notes did not constitute payment, contrary to the holding of the majority of the Court. It is quite evident that if the giving of the endorsed acceptances constituted

payment, the effect of the Merchant Marine Act, as amended in 1920, does not enter into the case at all. Even to approach that construction of the Act, the Court must first hold that the giving of endorsed acceptances, expressly required under a contract as payment, did not constitute payment, and the cases that we have cited are all to the effect that it did. We again call attention to the language of Chief Justice Taney, in

> *Phelps* v. *The Camilla*, Taney 400; Fed. Cas. No. 11073 (1838),

quoted by Judge Manton (R., 46) and requoted by petitioner at the top of page 4 of the petition.

By a familiar rule of interpretation the Act of 1920 must be construed in the light of existing law. It, therefore, by providing for the effect of a waiver, adopted the already established rules as to what would constitute a waiver. And the decision of Chief Justice Taney in *Phelps* v. *The Camilla*, was an outstanding case on that subject. Judge Hand's opinion seems to be in conflict with Justice Taney's, and, in view of this rule of interpretation, not to be distinguishable by reason of the statute.

VI.

Petitioner has confused cases of payment by endorsed and unendorsed notes.

The courts have always recognized a distinction between a case wherein the buyer has given his own note, unendorsed, and one in which he has given his note endorsed by others, or others' notes. Mr. Justice Miller in *Taylor* v. *Commonwealth*, Fed. Cas. 13,787, held that an agreement to ac-

cept an endorsed note, followed by delivery of the note and acceptance of it, constituted payment within the meaning of the agreement and the vendor's claim was on the note itself. This case has been followed in a number of instances: "*The Illinois*", Fed. Case 7005; "*The James J. Furber*", 129 Fed. 808, 813; *Atlas S. S. Co.* v. *Colombian Land Co.*, 102 Fed. 358; *Hall* v. *Stevens*, 116 N. Y. 201, 207.

The rule in New York is:

> "Where a creditor accepts the obligation of a third party for a debt contracted contemporaneously, the presumption is that it was taken in payment, and the burden of proving the contrary rests upon him who asserts it. Where, however, the obligation is received for a precedent debt, the presumption is that it was not taken in payment and the burden of proof is shifted accordingly. (Noel v. Murray, 13 N. Y. 167, 171; Gibson v. Tobey, 46 N. Y. 637, 640, 7 Am. Rep. 397; Hall v. Stevens, 116 N. Y. 201, 206; 5 L. R. A. 802; Whitbeck v. Van Ness, 11 Johns 409)."
>
> *Dibble* v. *Richardson*, 171 N. Y. 131, 138.

The case of *Kokomo Strawboard Co.* v. *Inman*, 134 N. Y. 92, 94, cited by petitioner, was a case involving the taking of an *unendorsed* note of the buyer, which is clearly not analogous.

The dissenting opinion herein, with all deference, likewise confuses *payment in fact* with payment as contemplated by the contract, and seems to intimate that if the coal company did not receive actual money, it should have a lien. Everyone will concede there was no payment of actual cash in the present case, otherwise there would have been no suit. But there was payment within the meaning of the contract, and the coal company

still has its action against the endorsers which action it is at present pursuing in the State Courts.

Other cases in which the principle has been recognized that a debt may be paid by a note, or otherwise than by money, are:

Murray v. *Lazarus*, 1 Paine, 572, 577.
Sheehy v. *Mandeville*, 10 U. S. (6 Cranch) 253, 264.
Segrist v. *Crabtree*, 131 U. S. 287, 289.

Conclusion

Petitioner raises no question which is deserving of a review by this Court and petition should be denied.

JOHN M. WOOLSEY,
CHAUNCEY E. TREADWELL,
WM. J. HUGHES,
Of Counsel

New York,
August 1928.

INDEX.

	PAGE
JURISDICTION	1
OPINION	1
STATEMENT OF FACTS	2
PLEADINGS	6
HOLDINGS BELOW	9
THE QUESTION PRESENTED	10
STATUTES INVOLVED	11
SUMMARY OF ARGUMENT	12

ARGUMENT:

FIRST POINT:

The only question presented is one of fact	14
The findings below are of the kind held by this Court to be conclusive	17
The findings below were well-founded	18
Similar situations have been similarly treated	20
The holdings below give full effect to lien provisions of the Merchant Marine Act of 1920	24
The decisions of this Court under the Merchant Marine Acts	29
Decisions of the lower Federal Courts under Merchant Marine Acts	30
Alleged conflicts with Circuit Courts of Appeal	34

PAGE

SECOND POINT:

Even if a maritime lien was created by the delivery of the coal it was extinguished by the payment made in accordance with the provisions of the contract of sale, namely: by the delivery to the coal company of the duly endorsed trade acceptances 36

Decisions of this Court relied on by petitioner .. 42

Alleged conflicts with Circuit Courts of Appeal .. 45

LAST POINT: 48

PAGE

Cases Cited.

Baker v. *Schofield*, 243 U. S. 114, 118 17
Bird of Paradise, The, 5 Wall. 545, 561 42
Bronx, The, 246 Fed. 809, 810 ..... 19, 32

Case Manufacturing Company v. *Soxman*, 138 U. S. 431, 438 ..... 18, 38
Central Trust Co. v. *Richmond N. I. & B. R. Co.* (C. C. A. 6th circ. 1895) 68 Fed. 90 39

Defiance, 3 F (2d) 48 33

El Amigo, 285 Fed. 868 47
Ely v. *Murray & Tregurtha*, 200 Fed. 368, 371 ..... 19, 31
Emily Souder, 17 Wall. 666, 670 ..... 42, 43

General Smith, The, 4 Wheat. 438 29
Germanic, The, 196 U. S. 589, 595 17

Havana, The, 64 Fed. 496 32
Hendrick v. *Lindsay* (1876) 93 U. S. 143 38
Houston & T. C. R. Co. v. *Texas*, 176 U. S. 66 37
Hubbard v. *New York etc. Investment Co.*, 119 U. S. 696, 702 37

Kimball, The, 3 Wall. 37, 45 42

Leland v. *Medora*, 15 Fed. Cas. 298, 301 ..... 14, 24
La Bourgogne, 210 U. S. 95, 114 17
Luckenbach v. *McCahan Sugar Ref. Co.*, 248 U. S. 139 37
A. Leschen & Sons Rope Co. v. *Mayflower M. G. & R. Co.*, 173 Fed. 855 ..... 19, 46
Lyman v. *Bank of the United States*, 12 How. 225, 243 39

McMurray v. *Brown*, 91 U. S. 257 40
Mason v. *Eldred*, 6 Wall. 231 39
Manning v. *Lyon*, 70 Hun 345 41
Morse Dry Dock Co. v. *Northern Star*, 271 U. S. 552 30
Murray v. *Lazarus*, 1 Paine 572, 17, Fed. Cas. 1049 14, 23, 41

SECOND POINT: PAGE

Even if a maritime lien was created by the delivery of the coal it was extinguished by the payment made in accordance with the provisions of the contract of sale, namely: by the delivery to the coal company of the duly endorsed trade acceptances 36

Decisions of this Court relied on by petitioner .. 42

Alleged conflicts with Circuit Courts of Appeal .. 45

LAST POINT: 48

CASES CITED.

PAGE

Baker v. *Schofield*, 243 U. S. 114, 118 17
Bird of Paradise, The, 5 Wall. 545, 561 42
Bronx, The, 246 Fed. 809, 810 ..... 19, 32

Case Manufacturing Company v. *Soxman*, 138 U. S. 431, 438 ..... 18, 38
Central Trust Co. v. *Richmond N. I. & B. R. Co.* (C. C. A. 6th circ. 1895) 68 Fed. 90 39

Defiance, 3 F (2d) 48 33

El Amigo, 285 Fed. 868 47
Ely v. *Murray & Tregurtha*, 200 Fed. 368, 371 ..... 19, 31
Emily Souder, 17 Wall. 666, 670 ..... 42, 43

General Smith, The, 4 Wheat. 438 29
Germanic, The, 196 U. S. 589, 595 17

Havana, The, 64 Fed. 496 32
Hendrick v. *Lindsay* (1876) 93 U. S. 143 38
Houston & T. C. R. Co. v. *Texas*, 176 U. S. 66 37
Hubbard v. *New York etc. Investment Co.*, 119 U. S. 696, 702 37

Kimball, The, 3 Wall. 37, 45 42

Leland v. *Medora*, 15 Fed. Cas. 298, 301 ..... 14, 24
La Bourgogne, 210 U. S. 95, 114 17
Luckenbach v. *McCahan Sugar Ref. Co.*, 248 U. S. 139 37
A. Leschen & Sons Rope Co. v. *Mayflower M. G. & R. Co.*, 173 Fed. 855 ..... 19, 46
Lyman v. *Bank of the United States*, 12 How. 225, 243 39

McMurray v. *Brown*, 91 U. S. 257 40
Mason v. *Eldred*, 6 Wall. 231 39
Manning v. *Lyon*, 70 Hun 345 41
Morse Dry Dock Co. v. *Northern Star*, 271 U. S. 552 30
Murray v. *Lazarus*, 1 Paine 572, 17, Fed. Cas. 1049 ..... 14, 23, 41

PAGE

The Nestor, 1 Sumner 73, 18 Fed. Cas. 9 ..... 14, 24, 28
New Bedford Co. v. *Purdy*, 258 U. S. 96, 100 30
Noel v. *Murray*, 13 N. Y. 167 41

Oceana, The, 244 Fed. 80 32
Ohio Falls, etc. Co. v. *Central Trust Co.* (C. C. A., 1895), 71 Fed. 916 40

Peyroux v. *Howard*, 7 Pet. 324 29
Phelps v. *The Camilla*, 19 Fed. Cas. 441, 444 ..... 14, 20, 41
Piedmont Coal Co. v. *Seaboard Fisheries Co.*, 254 U. S. 1 ..... 12, 17, 19, 29
Plamals v. *Pinar Del Rio*, 277 U. S. 151 30
President Arthur, 22 Fed. (2d) 584 ..... 1, 2

R. R. Ricou & Sons Co. v. *Fairbanks, Morse & Co.*, 11 Fed. (2d) 103 34
Robins Drydock & Repair Co. v. *Chesbrough*, 216 Fed. 121 32

St. Jago de Cuba, The, 9 Wheat, 409 29
Segrist, v. *Crabtree*, 131 U. S. 287 ..... 38, 41
Sheehy v. *Mandeville*, 6 Cranch 253, 264 ..... 39, 41

Taylor v. *The Commonwealth*, 23 Fed. Cas. 756 ..... 14, 21, 41

United States v. *Carver*, 260 U. S. 482 30

West Kentucky Coal Co. v. *Dillman*, 15 Fed. (2d) 25 32
Whitbeck v. *Van Ness*, 11 Johns (N. Y.) 409 41

Yankee, The, 233 Fed. 919 32
Youngs v. *Stahelin*, 34 N. Y. 258, 265 41

STATUTES CITED.

The Merchant Marine Act (§§971, 974 of tit. 46 of the United States Code) 11, 24

SUPREME COURT OF THE UNITED STATES.

W. A. MARSHALL & COMPANY, INC., Petitioner, *vs.* Steamship *President Arthur*, her engines, boilers, etc., AMERICAN PALESTINE LINE, INC., Claimant.	October Term 1928. No. 272.

BRIEF FOR RESPONDENT.

I. *Jurisdiction.*

This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, filed, pursuant to the provisions of the United States Code, Title 28, Section 347 (a), on July 14, 1928, and granted on October 15, 1928.

II. *Opinions.*

The writ seeks to review a decree of the Circuit Court of Appeals for the Second Circuit (*R.* 37) which affirmed a decree dismissing the libel entered October 10, 1927, in the United States District Court for the Southern District of New York. (*R.* 27.)

The opinion of the District Court by Judge Thacher is reported as *The President Arthur*, 22 F. (2d) 584, and appears at pages 25-27 of the Record.

The opinion of the Circuit Court of Appeals, Judge Learned Hand dissenting, is reported as *The President Arthur*, 25 F. (2d) 648, and the opinions are to be found at pages 30-37 of the Record.

III. *Statement of Facts.*

During February, 1925, negotiations were had between the petitioner, hereinafter called the Coal Company, and the American Palestine Line, Inc., hereinafter called the shipowner—both parties being corporations of the State of New York—for the sale of coal by the Coal Company to the Shipowner for use of the steamship *President Arthur*.

As a result of these negotiations two contracts for the sale of coal were made between the parties, one on February 18, 1925, Libelant's Exhibit 1, (*R.* 14-16), and one on March 4, 1925, Libelant's Exhibit 3. (*R.* 16-18.)

The reasons for the terms of these contracts, which were most unusual in connection with the supply of coal to a steamer are disclosed by the preliminary negotiations. The Shipowner requested a credit for a period of longer duration than the Coal Company customarily granted. (*R.* 9, 12.) That request led to an investigation of the Shipowner's credit status by the Credit Department of the Coal Company. It was found not to be satisfactory. (*R.* 9, 12, 13.) *In fact, the Shipowner was found not to be financially responsible.* (*R.* 12.)

Consequently the Coal Company decided to depart from its usual custom as to credit allowances to Steamship Companies and demand a formal contract providing that the coal should be paid for at the time of the delivery of the coal, by trade acceptances endorsed by three parties satisfactory to the Coal Company (*R.* 9), in order that the Coal

Company might have responsible parties to whom to look for payment and in order that it might be able to secure a prompt payment by negotiating the acceptances at a bank. (*R.* 10-11.) Three suggested endorsers, to-wit, J. W. Gottlieb, Jacob Wacht and Jacob Strahl, were investigated and proved acceptable to the Coal Company. (*R.* 11.) In fact, it was distinctly understood and agreed that these endorsers would be the primary obligors. (*R.* 22, 24.)

In an affidavit made in the State Court action against these endorsers, commenced after this suit was started, it is stated that the Coal Company desired payment by negotiable paper at the time of the delivery of the coal "in order to get the money at any time that they wanted it,—in fact, to discount that paper * * * we wanted additional security as we were not satisfied with the credit of the American Palestine Line"; (*R.* 9) that the offer to sell was only on condition that the trade acceptances to be given in payment would be signed by three indorsers acceptable to the plaintiff; that the indorsements were being given as part of the consideration; that the petitioner was not relying on the credit of the American Palestine Line, Inc., but that he was demanding the indorsements of these individuals as an absolute prerequisite to the sale; (*R.* 24) that "Without the consideration of such indorsements the plaintiffs would never have sold the coal to American Palestine Line." (*R.* 22.)

Sanford, Manager of the Tidewater Department of the Coal Company, who conducted the negotiations prior to the signing of the contract, was of opinion that there would be a maritime lien in the ordinary case of sale of coal to a ship (*R.* 10). But nothing was said of the lien in the course of the instant transaction.

The negotiations ended by a letter from the Coal Company which substantially embodied the terms of the proposed contract, *Claimant's Exhibit A* (*R.* 18), and as a result the two contracts, which covered the whole situation, providing the mines from which the coal should come, for inspection and for payment by trade acceptances, above mentioned were made.

The reason there were two contracts instead of one was that the shipowner found it would need more coal than originally estimated. (*R.* 21.)

The two contracts were, therefore, identic except as to the amounts of coal to be furnished and as to the dates.

Each agreement contains the following provisions with reference to the payment of the purchase price of the coal. (*R.* 14, 16.)

> "The buyer will pay for the said coal as follows:
>
> (1) By delivering to the Seller a trade acceptance drawn by it in favor of the Seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.
>
> (2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal, harbor barge freight and insurance on coal while in barges, which acceptance is also to be endorsed by the said Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.
>
> *The entire contract between the parties is stated above and there is no outside condition, warranty, agreement, or understanding.* Certificate of weights according to railroad bill of lading.

Witness the signatures of the respective parties hereto." (Italics ours.)

On each of the said agreements, below the signatures of the parties and above the signatures of the persons named as endorsers of the acceptances to be given by the Purchaser, there appears the following:

> "In consideration of the execution of the foregoing contract, and the delivery of said coal by the Seller to the Buyer, and in consideration of One Dollar ($1.00) paid to each of the undersigned, the receipt of which is hereby acknowledged, we jointly and severally agree to endorse the said trade acceptances described in the foregoing contract between the Seller and the Buyer."

According to the libel, 4,151 tons and 12 cwt. of coal were furnished and the total purchase price as claimed in the libel was $21,173.16.

For this amount two trade acceptances were given, one for $11,790.50, and one for $9,382.62.

The first trade acceptance for $11,790.50 was duly met.

The second trade acceptance, which was similar to the first, save as to due date and amount, is in the following form, (*R.* 19):

> "$9,382.62 New York, March 6th, 1925.
>
> May 8th, 1925, Pay to the order of W. A. Marshall & Company nine thousand three hundred and eighty-two and 62/100 dollars. Value received and charge the same to account of
>
> W. A. Marshall & Company. David L. Morrison, **Treas.**
>
> To American Palestine Line, Inc., No. 1493 Broadway, New York City, N. Y."

The following notice appears on the face of the trade acceptance: "Accepted—March 6th, 1925. Payable at National City Bank, 57th Street office. American Palestine Line, Inc., by James Wacht, Treasurer." On the reverse side of the trade acceptance appear the following names in the order given: "Jacob Wacht, Jos. W. Gottlieb, Jacob S. Strahl, W. A. Marshall & Co., by David L. Morrison, Treasurer."

It is for $9,382.62, with interest from March 6, 1925, the amount of the second trade acceptance which has not been met,—that the libelant is claiming a maritime lien against the *President Arthur* in this case.

IV. *The Pleadings.*

The libel in this case was in the conventional form, claiming a maritime lien of $9,382.62, under the Merchant Marine Act of June 5, 1920. (*R.* 1-3).

The amended answer, on which the case was tried, denies that the amount claimed was due owing to the fact that by pleading payment the Shipowner had delivered to the libelant the two trade acceptances endorsed by three parties as required by the contract; and that on delivery of such trade acceptances, the claims of plaintiff were paid and extinguished and any maritime lien had or claimed to be had by the plaintiff was extinguished and terminated. (*R.* 3.)

The existence of a maritime lien was denied and, by way of further answer, a claim was set up that the coal did not come up to the warranties of the contract. (*R.* 4-5.)

This branch of the defense has not been pressed and may, therefore, be disregarded so far as the matters before this Court are concerned.

In the seventh article of the answer there was a further answer setting up a pending suit in the Supreme Court, New York County, against the three endorsers on the trade acceptances, which constituted an election to treat the acceptances as payment.

For the litigation between the parties has not been limited to the libel now before the Court.

The present suit was commenced on May 11, 1925, when the libel was filed against the steamship *President Arthur*. (*R.* 1.)

On June 18, 1925, the Coal Company commenced an action in the Supreme Court of New York County against Gottlieb, Wacht and Strahl as endorsers of the second trade acceptance on the ground that their endorsements had been given as primary obligors for the purchase price of the coal and were an essential prerequisite to the sale. (*R.* 5, 22.) The American Palestine Line was not sued in this action (*R.* 20), obviously because the Coal Company from the beginning, owing to the financial condition of the American Palestine Line, looked only to the endorsers as the real contracting parties.

These facts are shown by affidavits of the Manager of the Tide Water Department of the Coal Company, Mr. Sanford (*R.* 20-23), and of George W. Hinckley, its counsel (*R.* 23-24), which were attached to a motion to the Supreme Court of New York County for summary judgment against the said endorsers. (*R.* 12.)

A motion was made in this State Court action by the plaintiffs, the Coal Company, for a summary judgment on the ground that the three endorser defendants did not have any defense to the action on the trade acceptances. (*R.* 22.)

In an affidavit in support of this motion Mr. Sandford, Manager of the Coal Company, said, (*R.* 22):

> "The claim that the defendants were accommodation endorsers for the benefit of W. A. Marshall and Co. is refuted by the terms of the offer and of the contracts and by their own signatures upon the contracts. Instead of being accommodation endorsers for the benefit of W. A. Marshall and Co., they are in fact straight endorsers, so far as W. A. Marshall and Co. is concerned, for without the consideration of such endorsements, the plaintiff would never have sold the coal to American Palestine Line, Inc."

Thus it is shown that Marshall & Company regarded the three endorsers as the primary obligors and that it was on their credit entirely that the sale was made. They were in the same position as if they had given their own notes instead of endorsing the trade acceptances.

This position is sustained further by the affidavit of Mr. Hinckley, of counsel for the Coal Company, who filed an affidavit in the same motion for summary judgment, in which he says (*R.* 24):

> "Were the defendants accommodation endorsers for W. A. Marshall and Co.? This question of fact is conclusively answered by the affidavit of Mr. Sandford and the annexed exhibits consisting of the offer to sell the coal and the two contracts therefor actually signed. These documents show that W. A. Marshall and Co. offered to sell the coal to the American-Palestine Line, Inc., only on condition that the trade acceptances to be given in payment would be signed by three endorsers acceptable to the plaintiff. The contracts themselves similar in form and for quantities of coal making up the aggregate, show exactly the basis upon which the defendants signed the trade acceptance here sued on. They were straight endorsers so far as W. A. Marshall and Co.

is concerned. They gave their endorsements as part of the consideration moving from American-Palestine Line, Inc. to W. A. Marshall and Co. for the purchase of the coal in question. The plaintiff's offer shows that the plaintiff did not rely solely on the credit of the American-Palestine Line, Inc., and that the endorsement of these individual defendants was an essential prerequisite for the purchase of this coal by their corporation. The contract itself demonstrates that these individual defendants understood completely the significance of their endorsements."

The claim for summary judgment was not allowed, and, at the time of the trial of this case, counsel for the Coal Company admitted that the action in the New York Supreme Court was pending. (*R.* 12.) So far as is known to the Shipowner, it is still pending.

The effect of this action in the State Court was not discussed in the opinions below.

V. *Basis of decisions below.*

The case was tried before Judge Thacher on June 3, 1927.

On September 13, 1927, an opinion was rendered by Judge Thacher holding that the contract above set forth was conclusive between the parties, and that in the face of the agreement no maritime lien could have arisen because the coal was to be paid for on delivery, and that, on the other hand, if a maritime lien had arisen, it could not survive payment in the form for which the parties contracted, that is, by the delivery of the acceptance. He found as a fact that it was entirely clear "*that the libellant did not rely on the credit of the ship*". The libel was, therefore,

dismissed and a final decree dismissing the libel entered on October 10, 1927. (*R.* 27-28.)

An appeal was taken on November 11, 1927 (*R.* 28), and the assignments of error, pointed to the rulings of Judge Thacher above mentioned, appear in this record at pages 28-29.

The case was argued in the Circuit Court of Appeals on March 14, 1928, and on April 9, 1928, a decision was handed down affirming the decision below. The opinion by Judge Manton, in which Judge Augustus N. Hand concurred, sustained Judge Thacher both on the point that there was not any lien and on the point that if there was a lien the delivery of the trade acceptance had extinguished it. (*R.* 32-33.)

Judge Learned Hand dissented on the ground that, as the Shipowner was a party to the trade acceptance it could not be claimed that payment had been made by the delivery of the acceptance because he still remained liable on the acceptance and had never paid it, and, further, on the ground that the contract, conclusive as it was in its terms, could not be considered to have displaced the presumptive maritime lien arising under the provisions of the Merchant Marine Act of June 5, 1920, so as to be construed as a waiver of the lien under the provisions of that Act.

VI. *The Question Presented.*

The real question presented to this Court herein is whether the evidence supports the concurrent findings of fact of the Courts below that the parties by entering into an exclusive contract as to the terms on which the coal was to be furnished to the *President Arthur*, waived any right to a maritime lien against the steamship.

There is a subsidiary question also involved, namely, whether if such a lien could have existed in spite of the contract and the surrounding circumstances it was extinguished when payment was made in accordance with the terms of the contract by the giving of the trade acceptances, on which the endorsers were understood to be the primary obligors.

It was to these questions that the only oral evidence offered in the case, which was on behalf of the Coal Company, and also the documentary evidence in the case, was pointed.

VII. *The Statutes Involved.*

The only statutes involved in this case are ss. 971 and 974 of title 46 of the United States Code. Act of June 23, 1910, c. 373, 36 Stat. 604 as amended by Act of June 5, 1920, c. 250, 41 Stat. 1005, commonly called the Merchant Marine Acts.

Section 971 of title 46 provides:

> "*Persons entitled to lien.* Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

Section 974 of title 46 provides:

> "*Waiver of right to lien.* Nothing in this chapter shall be construed to prevent the furnisher of re-

pairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States."

Summary of Argument.

The parties in this case were in a zone of free contract. The only question, therefore, was the question of fact: What was their intention?

It seems to us that their intention was to make a contract looking entirely to the credit of the named endorsers as principal obligors—a contract as much outside of any maritime lien security as if the coal had been bought on the same contract for an apartment house.

We contend

I. That, under the decisions of this Court,* this question is concluded in the shipowner's favor by the concurrent findings of the Courts below: that by a special written contract for the sale of coal—made by its express terms the exclusive arrangement between the parties—and based

* The rule as to the acceptance of concurrent findings of lower courts was applied by this Court to a similar finding in an analogous case. *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U. S. 1, 13.

solely on the credit of three outside parties, the Coal Company had waived the right to a lien it might otherwise have had, under the statute above quoted, against *President Arthur*, if the coal had been furnished to her without the special contract;

II. That, as under the special contract the parties had agreed that the trade acceptances should be payment for the coal and as these acceptances were given by the shipowner and accepted by the Coal Company in payment, the contract had been fully performed and discharged, and the relationship between the parties which had sprung out of the contract had ended, for in accordance with a long line of decisions in this Court negotiable paper is payment when it is so agreed between the parties;

III. That hence the relationship could not be resurrected in order to make a foundation for a maritime lien as a security for the payment of the purchase price of the coal;

IV. That the Courts below gave full effect to the lien provisions of the Merchant Marine Act, that no question of the construction of that Act is here presented and that this seems to be admitted by the petitioner;

V. That the decisions of this Court cited by the respondent as in conflict with the decision below are not in conflict but are in harmony, and

VI. That, furthermore, the Courts below applied precisely the same principles as have been repeatedly applied to similar situations by members of this Court sitting on Circuit, as they are still applied by the lower Federal Courts

today: By Chief Justice Taney, in *Phelps* v. *The Camilla*, Taney 400, 19 Fed. Cas. 441, 444; by Mr. Justice Miller, in *Taylor* v. *The Commonwealth*, 14 Am. Law Reg. (U. S.) 86, 23 Fed. Cas. 756; by Mr. Justice Thompson in *Murray* v. *Lazarus*, 1 Paine 572, 17 Fed. Cas. 1049; by Mr. Justice Woodbury, in *Leland* v. *Medora*, 2 Woods. v. M. 92, 15 Fed. Cas. 298, 301, and by Mr. Justice Story in *The Nestor*, 1 Sumner 73, 18 Fed. Cas. 9.

FIRST POINT.

THE ONLY QUESTION PRESENTED IN THIS CASE IS A QUESTION OF FACT WHICH WAS DETERMINED IN FAVOR OF THE RESPONDENT BY THE CONCURRENT FINDINGS OF FACT OF BOTH COURTS BELOW, NAMELY, THAT ANY MARITIME LIEN WHICH MIGHT HAVE ARISEN IN ORDINARY COURSE ON THE "PRESIDENT ARTHUR" BY THE FURNISHING OF THE COAL HAD BEEN WAIVED OWING TO THE CONTRACT BETWEEN THE PARTIES WHICH PROVIDED FOR OTHER SECURITY AND WHICH BY ITS EXPRESS PROVISIONS WAS MADE EXCLUSIVE OF ANY OTHER ARRANGEMENT BETWEEN THEM.

As the petition for certiorari does not state the real issue in this case and, as the brief for the petitioner seems to be subject to the same criticism, we have thought it advisable at the beginning of our argument to show this Court that the only question is one of fact, dependable in part on the oral evidence of a witness called by the Coal Company before the District Judge, whose finding, which was contrary to the Coal Company's contentions, was affirmed by the Circuit Court of Appeals.

If the coal had been furnished to the *President Arthur* on order of her owner at New York without any other cir-

cumstances whatever, the Coal Company would have been entitled to a lien under the provisions of Section 971, Title 46 of the Code above quoted.

Under such circumstances a contract implied in fact would have arisen which would have had for its security the lien under the Statute.

What actually happened, however, was very different. After the long negotiations described above, a contract was entered into for the sale of the coal which provided that it should be paid for by trade acceptances containing the endorsements of three persons satisfactory to the Coal Company.

The contracts, moreover, contained the following provision:

> "The entire contract between the parties is stated above and there is no outside condition, warranty, agreement or understanding" (*R.* 14, 17).

This provision denotes by its terms an express exclusion of the possibility of any contract implied in fact, on which a claim for a lien might have been based, or any other kind of contract than that of which it formed one of the principal parts.

There is, therefore, in this case an express waiver of the lien in accordance with the provisions of Section 974 of Title 46 providing for the waiver of the right to a lien, which says that such a waiver may be effected "by agreement or otherwise."

So not only by the obvious intention of the parties in their negotiations and in their subsequent attitude, but also by the express terms of the contract the basis of claiming that there was a maritime lien on the *President Arthur* was excluded.

Judge Thacher said:

> "It is entirely clear, I think, that the libelant did not rely on the credit of the ship." (*R.* 27.)

In reading this finding it is to be remembered that Judge Thacher had before him the evidence introduced by the Coal Company together with such documentary evidence as was introduced on behalf of the Shipowner during the examination of the Coal Company's only witness.

Therefore, without any evidence offered on behalf of the Shipowner, construing the evidence of the Coal Company alone, the Court found that it was clear that the Coal Company did not rely on the credit of the ship.

This fact was amply supported by the affidavit of Mr. Sandford, Manager of the Coal Company, and Mr. Hinckley, counsel (*R.* 24), extracts from which have been set forth above in the statement.

To this finding the Coal Company assigned error, Assignments of Error, Nos. 2-5, R. 29.

In the opinion of the Circuit Court of Appeals, Judge Manton said:

> "It is significant that the agreement provides that the indorsements were made by these individuals as part of the consideration of the sale of the coal, and it was sworn in an affidavit that, without the consideration of such indorsements, the appellant would never have sold the coal to the American-Palestine Line. There was 'no outside condition, warranty, agreement or understanding.' Thus it appears that the credit of the ship was not accepted by the appellant, but by the contract of the parties, trade acceptances with three indorsers were insisted upon, and everything for which the appellant had contracted was given in payment" (*R.* 32).

The findings below are of the kind held by this Court to be conclusive.

In the case of *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, coal for the fishing season had been furnished by a Coal Company to the owner of a fleet of vessels and it had been by the owner distributed among the vessels at its own convenience.

It was held by the Circuit Court of Appeals in that case and by this Court that this did not give rise to a statutory lien because the coal was not furnished to the vessel by the Coal Company but was furnished to their owner and so did not fall within the terms of the Lien Statute of 1910.

A further contention in the case, however, was that there had been an agreement that in consideration of the Piedmont Company's furnishing the coal, it would have maritime liens on the vessels which consumed the coal, and it was contended that this gave rise to a non-statutory lien which entitled the Coal Company to a maritime lien on which it could recover *in rem* against the several vessels for the amount of coal each had consumed.

The lower Courts had held that there was not any such agreement, and this Court said, in affirming the decision of the Circuit Court of Appeals, 254 U. S. at page 13:

> "It was also argued that the parties made an express agreement that the Coal Company should have a lien; that is, that they created by agreement a non-statutory lien. The concurrent findings of fact by the lower courts, which we accept (*Baker* v. *Schofield*, 243 U. S. 114, 118; *La Bourgogne*, 210 U. S. 95, 114; *The Germanic*, 196 U. S. 589, 595); are to the contrary".

In the instant case we argued that the parties contracted that the Coal Company should not have a lien.

It is submitted, therefore, that the situation in principle is the same in this case as it was in the case just discussed and that the same rule should be applied.

In *Case Manufacturing Co.* v. *Soxman*, 138 U. S. 431, the question was whether the Court erred in finding that the notes of a limited liability company were accepted as payment and satisfaction of the original liability under the contract. The Court said, at page 439:

> "Here we face the proposition that we are not triers of fact. And if there were evidence upon which such a finding might properly rest, we should accept the finding as conclusive, and inquire no further into the testimony than we should into its sufficiency to sustain the verdict of a jury. * * * It is enough to affirm that there is in these matters testimony from which such a conclusion might be drawn; and, therefore, the findings of the trial court in this respect cannot by this court be ignored."

The findings below were well founded.

Indeed, this is not a case in which appreciation of the facts tends to discredit the findings of the lower courts or to reflect unfavorably on the principles on which the findings were based.

It is worth noting again that in this case the only witness called and who testified orally before the District Judge was a witness on behalf of the libelant, and that thus the findings of the Courts below really meant that the Coal Company by its own evidence accompanied by contracts and other written exhibits proved that it did not give credit to

the ship but gave credit to the endorsers *as primary obligors*, and thus waived the maritime lien which would have risen in the case of an order for coal followed by a delivery.

The contract was the principal matter indicative of the intention of the seller not to rely on the credit of the ship.

The contract was clear and its terms consistent. The contract stated that it expressed the whole of the intentions of the parties and there was nothing to suggest that it did not do so.

The seller was aware of the existence of a maritime lien in ordinary course for the sale of coal to a vessel, but did not mention the lien in the contract but expressly declared that there was no outside agreement or understanding. The seller testified that he would not have sold the coal merely on the credit of the vessel and the owner; he required trade acceptances *with named endorsers as primary obligors*. And the terms in which he required the trade acceptances disclose no intention to rely on the credit of the ship. When it is recalled that the only conclusion that need be drawn from these facts is that the seller did not rely on the credit of the vessel, the findings of the lower courts seem unquestionable. *Ely* v. *Murray & Tregurtha*, 200 Fed. 368, 371 (C. C. A. 1). *The Bronx*, 246 Fed. 809, 810 (C. C. A. 2).

In considering these findings it must be borne in mind that the opinion of the parties as to the legal significance of their acts is without legal effect. *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 10.

Even if there were some evidence of an intention on the part of the seller to retain the lien, it is doubtful, whether such intention could be enforced as against "the plain sense of the binding words of the agreement" *A. Leschen & Sons Rope Co.* v. *Mayflower G. M. & R. Co.*, 173 Fed. 855, 857.

It is what parties do, not what they intend to do or what they think they are doing, which determines legal rights.

Similar situations have been similarly treated.

The construction of the situation in this case by the Courts below is absolutely in accordance with the construction of a similar situation in *Phelps* v. *The Camilla*, Taney 400, 19 Fed. Cas. 441, 444, the libelants, Phelps Dodge & Company, had furnished copper for repairing the bottom of the brig *Camilla* at New York City, which was not her home port. The copper was ordered by her owners' agents, Smith & Town, was billed to them originally and paid for by their negotiable six months note, which was not met owing to insolvency of Smith & Town.

When Phelps Dodge & Company sued the *Camilla* at Baltimore claiming a maritime lien, Chief Justice Taney, after discussing the facts and several possible grounds of decision, said, 19 Fed. Cas. at page 445:

> "It must not, however, be understood, that the decision would be different, if the copper had been originally charged to the Camilla and her owners. It is true, that upon such a sale, the libellants would, in the first instance, have acquired a lien upon the brig: but that lien, in my opinion, would have been waived by taking afterwards the note of Smith & Town. This is the doctrine recognized in The Nestor (Case No. 10, 126), and in the case of Murray v. Lazarus (*id.* 9,962), where the material men had agreed with the master to take a bill of exchange on the agents of the owners, the court held that it was a waiver of the lien.

"In the last-mentioned case, the court said: 'If this is to be considered a regular and ordinary bill of exchange, it was a satisfaction for any lien that might have existed, and must be considered as a relinquishment thereof'. The same may be said of the note given by Smith & Town in this case, even if the account in the books of Phelps, Dodge & Co. is corrected in the manner stated in the testimony of James. If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue."

In *Taylor* v. *The Commonwealth*, 14 Am. Law Reg. (N. S.) 86, 23 Fed. Cas. 756, Mr. Justice Miller while sitting on Circuit said at page 757:

"I have no hesitation in saying myself, therefore, that the rule of allowing a lien for these repairs ought to be extended to a vessel in a home port, as well as to a vessel in a foreign port, and that this vessel, and this work and labor, are of a character which, in my opinion, probably constitute such a lien, if the parties had permitted it to rest on the implied results of the work and labor done under such circumstances. But, unfortunately, they did not. They entered into a specified contract for this work. There is no doubt about that contract, although some little doubt is expressed as to the precise reliance placed upon it

by Mr. Taylor. The contract itself, I think, shows for itself what he did rely on, and that is the trouble in this case. Before the vessel was docked, and before any work was done on her, they made a specific agreement, which was reduced to writing, not signed by the parties, but a memorandum made by the agent of the wrecking company, and that agreement is this: That if the repairs did not exceed $10,000, they were to be paid for one-half in cash, and the balance in an endorsed note; if they exceeded $10,000 they were to be paid one-third in cash and the balance in endorsed notes, payable, I think, in thirty, sixty and ninety days. As to what 'endorsed notes' meant, there is no controversy. It meant personal security. Now, the contract was: 'That for this work I am going to do for you, you are to pay me a considerable portion in cash, as the work progresses, or before you get the vessel and at the end of it you are to pay me the balance in good negotiable notes, with proper and sufficient security.' I have no doubt of the fact that a man doing that kind of work may rely on the owner of the vessel, and that if he makes no specific contract on the subject, he will have a right against the owner and the vessel, and under some circumstances against the master; but that is a lien which the law implies from the circumstances, and if a specific contract is made which shows that the party relied upon other security and other modes of payment, then he cannot enforce the admiralty lien. It is very clear to me, here, that Captain Taylor, in making this contract, never intended to rely on the security of the vessel itself, because he made this contract for the very best kind of other payment. What better payment can a man have than secured papers? And what is the use of his relying on the vessel as security when he says: 'Before you get this vessel out of my hands, you are to pay me one-half cash, and the balance in endorsed notes with good security.'

"I think, having made an express contract for an express security, he cannot say, 'I did this work on the credit of the vessel.' In other words, I think if there is any question of admiralty lien, a lien for supplies and repairs, that it must have been the intention in the mind of the party who furnishes the supplies and repairs whether in a home or foreign port, to rely on the credit of the vessel; and although in a foreign port (and I suppose the same thing would apply here when the supplies and repairs are necessary, and nothing is said to the contrary), the law presumes a reliance on the vessel, yet it is only a presumption. But it is said that in foreign ports such is the presumption, because the man who furnishes the supplies is not there and may not know anything of the owner. If it can be shown that he did not rely on that alone, and that he intended to rely on other security, which he supposed sufficient, or which was supposed to be better, then he had no lien, because the lien arises from implication, from the fact expressed or implied that the man in furnishing the supplies or contracting a debt, relied on the vessel as security, and if he relied on anything else it is another security sufficient, or supposed to be, which, in case that turned out to be insufficient, does not restore his lien. I am sorry for this result, because it seems this corporation is a mere sham, and whether any party belonging to it may be individually liable or not, I do not know. But the result of it is that this decree must be reversed."

In the case of *Murray* v. *Lazarus* (C. C. S. D. N. Y., 1826), 1 Paine 572; Fed. Cas. 9962, a vessel was bound from New Orleans to New York, but was compelled to put into Wilmington to refit. Circuit Justice Thompson, in deciding the case, found that there was a special agreement between the master of the ship and the respondents

for the payment of the advances which they made to enable the ship to obtain repairs. The respondents took from the master a bill of exchange for that amount and Circuit Justice Thompson, in holding that the lien had been waived, said in words which are particularly applicable to the present case (Italics ours):

> "The case is not open for the inquiry, whether, by the general maritime law, every contract made by the master for repairs and supplies for his ship whilst on a foreign voyage, does not import an hypothecation. *When an express contract has been entered into for the payment of such expenses, that must be resorted to, and will be considered a waiver of such implied lien, if any existed. And a party who has waived his right in this respect cannot be permitted, at a subsequent time, and under a change of circumstances to reinstate himself in his former condition to the injury of others.*"

To the same effect are the views expressed in the opinion of Mr. Justice Woodbury on Circuit in *Leland* v. *Medora*, 2 Woodb. & M. 92, 15 Fed. Cas. 298, 301.

Mr. Justice Story sitting on Circuit in *The Nestor*, 18 Fed. Cas. 9, said:

> "So if the nature of the contract excludes the implication that the parties intended any lien the same result follows: for it is competent for parties to waive a benefit of this sort."

The holdings below give full effect to lien provisions of the Merchant Marine Act of 1920.

The petition for certiorari rightly states the rules enacted by the Merchant Marine Acts.

It states the rules to be "the burden of proving that supplier did not rely upon the credit of the vessel is now upon the claimant" or in other words that the lien "is presumed on proof of due delivery • • • until such presumption is destroyed by affirmative proof of agreement that the promising party was to be exclusively liable for payment".

But the petition does not state that those rules were not observed.

The petition does not deny that the lower courts placed the burden of proof on the buyer to show that the seller did not rely on the credit of the ship. He did not in his assignment of errors declare that the district court failed properly to place the burden of proof.

That the Circuit Court of Appeals did place the burden of proof on the buyer is apparent from its opinion, particularly the language

> "nothing in this Act bars proof that whatever was furnished was furnished on the mere credit of the owner or third party and in no sense upon the credit of the ship." (*R.* 32.)

That both lower courts found that the buyer had successfully borne the burden and established that credit was given to the ship is pointed out above. (*Ante*, pp. 14-16.)

The petition for certiorari then states:

> "In the instant case, there was no affirmative proof of the agreement that the principal party was to be exclusively liable for payment" and it is declared that "such finding is not well founded."

Obviously this is a dispute as to facts and does not state any principle beyond those already discussed.

It may be pointed out here that the dissenting opinion below does not state a different rule from that applied by the majority but merely declares that the Act requires that the claimant must show that the lien was released or waived and that "the proof falls far short of that." (*R.* 36.)

Neither the dissenting opinion nor the petition states any principle or rule growing out of the Act which the lower courts did not observe.

Finally, the petition states that the Merchant Marine Acts were nullified because "the lower court held that, although there was no specific agreement to waive the lien and no estoppel but merely because the supplier had by agreement some security beyond the vessel he did not rely on the credit of the vessel as well".

In this connection it should be pointed out that the dissenting opinion below said "the claimant must affirmatively show, there being no agreement and no estoppel, that the parties could not have intended both securities to stand together" (R. 36).

The quoted language does not state any legal principle or rule as to the burden of proof other than that already discussed.

The language does not say that the court did not properly place the burden of proof but merely disagrees with the conclusion as to whether the party intended to rely on the credit of the vessel. But the language does not even state correctly what the courts below did hold.

As has been pointed out before, they held that the parties agreed that the trade acceptances should constitute sole payment, and that the seller did not rely on the credit of the ship. Both of these statements in the dissent and on the petition are based on the assumption that there was no contract. But if the lower courts did hold as the peti-

tion alleges, it would only be a holding on facts as to whether the seller intended to retain a lien.

There is no question as to the application of the Merchant Marine Acts at this day. They have been often before this Court and before the lower federal courts.

The petition for certiorari does not allege that the decision below conflicts with any applicable decisions relative to the construction of the Merchant Marine Acts.

The effect of the Act, at least as applicable to this case, was to remove the presumption that existed that the seller of goods to a vessel in her home port relied on the credit of the owner and replaced it with a presumption that he relied on the credit of the ship, or, in other words, it removed from the seller the burden of proving that he contracted for his lien and placed the burden on the buyer to show that a lien was not contemplated or that it was waived.

The Act put the supplier in a home port in the same situation as the supplier in a foreign port. There is no change in the substantive law as to maritime liens, but merely as to the manner in which such lien shall be established at trial.

The Act does not declare what constitutes waiver. By the Act the waiver of a maritime lien may be by "agreement or otherwise." *If the Act may be said to enter into the field of maritime liens where there is evidence of the intentions of the parties or a contract, it cannot be held to require waiver in any set form or in any particular words, but leaves the finding of such waiver subject to existing rules affecting the creation of maritime liens. Waiver is just what it previously was.*

Nothing in the Act or in the intention of the legislators is shown which purports to affect the former rule that any-

thing inconsistent with the existence of a lien may constitute waiver.

The Act does not require the parties to contract for a lien; nor can it be said to specify the manner in which to waive a lien. The existence of a lien is made an incident to the ordinary transaction of sale to a vessel, and can be altered like any other incident by the agreement of the parties.

The question is merely whether the evidence preponderates in favor of an agreement that the implied usual terms of the transaction shall be superseded by a special agreement in this particular case.

The maritime lien is still given by implication of law and is not to be implied as against evidence indicative of a contrary purpose. The presumption of a lien created by the Act disappears when evidence is admitted, for it is no longer of any use. Cf. Story, J., in *The Nestor*, 18 Fed. Cas. 9, 14.

The Act does not declare what inferences are to be drawn from specific evidence beyond the mere evidence of sale to a ship.

The lien is still stricti juris. Its purpose is to enable the ship to move freely and not to protect the seller. The only reason that the lien is given is that the vessel could not secure goods unless the lien were given because the seller would not furnish them. That is the reason why no lien exists where it is shown the seller did not rely on the credit of the ship.

The decisions of this Court under the Merchant Marine Act.

And the applicable decisions of this court are free from the suggestion of any rules or principles further than those above declared to be established by the Merchant Marine Acts.

In *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, the legislative purpose motivating the enactment of those laws was stated at page 11 to be *first*, "To do away with the artificial distinction by which a maritime lien was given for supplies furnished to a vessel in a port of a foreign country or State, but denied where the supplies were furnished in a home port or state. *The General Smith*, 4 Wheat, 438"; *second*, "To do away with the doctrine that, when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely on the vessel and that hence no lien arises. *The St. Jago de Cuba*, 9 Wheat. 409"; *third*, "To substitute a single Federal statute for the State statutes insofar as it conferred liens for repairs, supplies and other necessaries. *Peyroux* v. *Howard*, 7 Pet. 324".

And it was further said, on page 11, "The reports expressly declared that the bill makes '*no change in the general principles of the present law of maritime liens*, but merely substitutes a single statute for the conflicting state statutes.' "

In that case this Court held, page 13, that maritime liens were *stricti juris* and could not be extended by construction, and that as the goods were not furnished to the vessels, liens could not be maintained against them.

In *New Bedford Co.* v. *Purdy*, 258 U. S. 96, 100, the court reasserted the limited purposes of the Act and declared that it did not change or extend the rules as to what was construction or repairs. That decision approved of the statement that the Act made no change in the general principles of the present law of maritime liens.

Again, in *United States* v. *Carver*, 260 U. S. 482, it was said, at 488:

> "The Act of 1910, by which the transactions with the *Clio* were governed, after enlarging the right to a maritime lien and providing who shall be presumed to have authority for the owner to procure supplies for the vessel, qualifies the whole in Sec. 3 as follows: • • • We regard these words as too plain for argument. They do not allow the materialman to rest upon presumptions until he is put upon inquiry, they call upon to inquire."

And, in *Morse Dry Dock Co.* v. *Northern Star*, 271 U. S. 552, it was said, at 554:

> "The only importance of the statute was to get rid of the necessity for a special contract or evidence that credit was given to the vessel."

In that case the question considered was whether the master had authority to bind the vessel.

As late as *Plamals* v. *Pinar Del Rio*, 277 U. S. 151, the rule of strict construction as to the existence of maritime liens is reaffirmed.

Decisions of the lower Federal Courts.

When one considers Judge Learned Hand's dissenting opinion it is perfectly clear that in his view there cannot be

any waiver of the right to a maritime lien in the case of supplies furnished to a vessel unless that waiver is explicitly made by the contract.

The Court should bear in mind the statute under which maritime liens are based is not narrowed in this way. The Statute provides that the right to a lien may be waived at any time "by agreement or *otherwise*".

The construction which Judge Hand has put on the statute eliminates the word "*otherwise*" entirely and makes it impossible, in his opinion, to establish a waiver of the right to a lien by any implication no matter how strong.

In this attitude he is not supported by the authorities which have always recognized waiver by implication.

The decisions of the lower courts uniformly place on the buyer the burden of proving that the sale was not on the credit of the vessel and then proceed to examine all the circumstances to determine the intention of the party, and in some the intention is found to rely on the credit of the vessel and in others such intention is not found. None of these cases established any principles in respect of the finding of such intention different from those applied in the instant case.

The decisions of the Circuit Court of Appeals agree as to the effect of the Acts. In *Ely* v. *Murray & Tregurtha Co.*, 200 Fed. 368, 371, the Circuit Court of Appeals for the First Circuit stated the same rule as that applied in the Court below. That opinion declares:

> "The engine was installed in the home port of the owner; but under the statute cited, this is no longer a matter of importance. Beyond that, all the statute requires is that whatever was furnished should have been furnished on the order 'of the

> owner' and it also provides that, in order that a lien therefor may be enforced in rem, 'it shall not be necessary to allege or prove that credit was given to the vessel.' Of course, this does not bar proof that whatever was furnished was furnished on the mere credit of the owner, and in no sense on the credit of the vessel; but it meets the presumption that there is no lien for materials furnished on the order of the owner, as there is a presumption in favor of a lien when the articles are ordered by the master under appropriate circumstances."

This rule was applied later in the same circuit in *Robins Drydock & Repair Co.* v. *Chesbrough*, 216 Fed. 121. In that case a note was given but the Court held from the circumstances that there was a mortgage and that there was nothing in the case which tended to show that the original debt was merged.

In the Second Circuit the rule was stated in the following language in *The Bronx*, 246 Fed. 809, 810:

> "The lien is presumed on proof of due delivery on request of lawful supplies, until such presumption is destroyed by affirmative proof of agreement that the promising party was to be exclusively liable for payment." Citing *The Havana*, 64 Fed. 496; *The Yankee*, 233 Fed. 919; *The Oceana*, 244 Fed. 80.

The same principle as to the application of this Section of the Act was recognized also in *West Kentucky Coal Co.* v. *Dillman*, 15 Fed. (2d) 25 (C. C. A. 8).

There are many district court cases touching on the creation of maritime liens under the Merchant Marine Acts, but, of course, none of them establish principles beyond those declared by this Court and by the Circuit Courts of

Appeals. In some of the cases on the facts the lien is found, in others it is found to be waived.

It is of interest that the case nearest to the one under consideration as to facts was decided in the same fashion and with the same result.

In *The Defiance*, 3 F. (2d) 48, various claims were made against the proceeds of the sale of the vessel, among them a lien was claimed for a marine engine furnished to the vessel. The vessel was mortgaged to a bank. The master desirous of purchasing the engine from the libelant endeavored to arrange with the bank for credit but failed. The libelant sold the engine under an agreement which provided payment partly in cash and the balance in twelve notes. The wife, the owner of the vessel, joined in the contract. Title remained with the libelant until final payment. The contract contained a clause similar to that in the instant case, that there were no understandings or agreement other than expressed therein. The case for the suppliers was stronger than in this case, for when the notes were given they contained a clause that the acceptance of the notes did not waive any maritime lien which the suppliers had. There was also some evidence that the seller intended to rely on its maritime lien for protection, but the Court held on the facts that the engine was not sold on the credit of the vessel and disallowed the lien claimed. Judge Groner said, at page 51:

> "The effect of the statute avoids the necessity of proof that credit was given to the vessel. It does not, however, bar proof that the supplies or equipment were furnished on the credit of the owner alone, and it cannot be doubted that in the latter case no lien exists. If this be correct, it would follow, necessarily, that a decision of the question depends upon the facts."

> "Since, therefore, the parties, by their own solemn contract in writing, have declared the whole agreement to be a sale on the part of the one to the other with a reservation of title, and an agreement on the part of the other to pay the balance of the purchase price in monthly installments, and have likewise declared that no verbal understanding or agreement should modify these terms, it seems to me it would be a far stretch of a law to hold that this was a sale on the credit of the vessel; nor in my opinion is this conclusion shaken by the printed stipulation contained on the face of the notes evidencing the deferred payments, for in itself it is no more than a claim of reservation of a lien on an unnamed vessel if the law should give it."

Alleged conflicts with Circuit Courts of Appeal.

The petitioner contends that the instant decision is in conflict with *R. R. Ricou & Sons Co.* v. *Fairbanks, Morse & Co.*, 11 F. (2d) 103. This is not correct.

In that case, it was argued before the appellate court, for the first time, that the libel failed to establish the existence of a maritime lien on the ground that it appeared that the seller retained title to the property. Relative to this challenge, the Court said, page 104:

> "But the libel as a whole was not subject to objection on that ground, because its allegations showed that appellee, upon the order of the boat's owner, furnished to it labor and material the title to which was not shown to have been retained by the appellee."

After thus disposing of the question the Court proceeded to hold that the retention by contract of title as security

was not inconsistent with the existence of the lien. For this reason, the decision is cited to hold that the seller need not allege or prove that he sold the goods on the credit of the vessel. It must be recalled that the decision was on exceptions—equivalent to a demurrer—to the libel and before trial. It does not appear from the opinion that the contract itself was before the Court. The rule laid down by the Court then merely was that the burden of proving the seller did not rely on the credit of the ship is on the buyer. The same rule was applied by the lower courts in this case.

Assuming (but not conceding), as Judge Learned Hand said in his dissent, that the shipowner must prove affirmatively that—

> "the parties could not have intended both securities to stand together." (*R.* 36.)

we submit that the record shows just that:

It shows it as follows:

1. By the agreements themselves (*R.* 14-18).

2. By the fact that the Coal Company "didn't believe that the * * * Line was financially responsible" (*R.* 12).

3. By the fact that the Coal Company "didn't like the account and wanted to get trade acceptances * * * to discount" (*R.* 9).

4. By the fact that although the Coal Company filed its libel, it did not rely thereon but subsequently took an entirely different and inconsistent position in respect of its claim, to-wit, it commenced an action in the Supreme Court of the State of New York against the endorsers—the primary obligors—and sought to secure judgment on the acceptances (*R.* 12).

5. By the fact that in that action in the New York Supreme Court the Coal Company took the position that the endorsers were the primary obligors (*R.* 22-24).

Judge Learned Hand says that "the law looks to the essence" (*R.* 35). That is what we contend, and we say that, examining the record and harmonizing all its elements, the essence of the transaction was that the Coal Company was relying upon the endorsers as primary obligors and not upon the Shipowner and, hence, not upon a maritime lien on the *President Arthur*.

Since the findings of the lower courts are amply supported by the evidence and since the principles applied have long been established by this Court the decree below should be affirmed.

In the instant case, it is submitted, therefore, there was a clear waiver of the right to a lien.

SECOND POINT.

EVEN IF A MARITIME LIEN WAS CREATED BY THE DELIVERY OF THE COAL IT WAS EXTINGUISHED BY THE PAYMENT MADE IN ACCORDANCE WITH THE PROVISIONS OF THE CONTRACT OF SALE, NAMELY: BY THE DELIVERY TO THE COAL COMPANY OF THE DULY ENDORSED TRADE ACCEPTANCES.

The contracts both provided that "*the buyer shall pay for the said coal as follows*"; then followed the details as to the trade acceptances by which the payment was to be made, and which were delivered to the Coal Company in pursuance to the terms of the contracts.

Judge Manton, in the opinion for the Court below, said, *R.* 33:

> "Where parties agree to an express contract as payment, the contract becomes extinguished by full performance and so it is impossible that either party should have any claim against the other arising out of the contract. No lien can exist in favor of the materialman when he receives in payment that for which he stipulated when the contract was made."

This is strictly in accordance with the principles repeatedly laid down by this Court.

In *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, Justice Brandeis said, at page 149:

> "Whether the transfer of money or other thing shall operate as payment, is ordinarily a matter which is determined by the intention of the parties to the transaction."

and in that case loans by an insurance company to the insured were held not to constitute payment because by the agreement between the insurer and the insured they were mere loans.

In *Houston & T. C. R. Co.* v. *Texas*, 177 U. S. 66, at 98, the Court held that the taking of warrants by a state in accordance with the terms of the contract made the transaction finished and completed and that

> "Neither party as between themselves can thereafter act as if the contract had not been performed."

In *Hubbard* v. *Investment Co.*, 119 U. S. 696, 701, 702, recovery for services as broker was claimed on the common counts for work and labor done, but it was held that no such recovery could be had

> "Because it clearly appeared that whatever was done by the plaintiff in that behalf was done under

the special written contract, and not upon any implied contract for compensation."

In *Case Manufacturing Co.* v. *Soxman*, 138 U. S. 431, 438, the question was whether the court erred in finding that the notes of a limited liability company were accepted as payment and satisfaction of the original liability under the contract. One of the notes had been discounted. The Court said at page 438:

> "Supposing this first note discounted by the plaintiff had been paid by the Milling Company, could the plaintiff then be heard to say that these notes were not received in payment? While, in fact, it was not paid, yet the plaintiff treated it as its property and negotiated it. Can it now be heard to say that such note was simply evidence of the amount due, when it received and used as its property? It is unnecessary to affirm that these matters show conclusively that the obligations assumed by the original contract were satisfied and discharged by the settlement and notes * * *."

In *Segrist* v. *Crabtree*, 131 U. S. 287, one of questions considered was whether notes were received as actual payment or only as evidence of the amount to be paid. In that case there was an agreement that notes were to be given for the purchase price of cattle. The Court approved the charge to the jury which stated that as the sale was unconditional and as the notes were given and accepted as absolute payment, the original debt was extinguished and the remedy of the defendant was on the notes. And it was said the question as to whether the notes were given and accepted in payment of the cattle was fairly left to the jury.

In *Hendrick* v. *Lindsay* (1876), 93 U. S. 143, the Court said at page 149:

> "• • • but negotiable promissory notes are equivalent to the payment of money, if received by the creditor in satisfaction • • •."

In *Lyman* v. *Bank of the United States*, 12 How. 225, 243, it was held that the question whether there was an agreement at the time to receive notes in satisfaction of the debt or whether the circumstances attending the transaction warranted such inference were properly questions for the jury.

Chief Justice Marshall in *Sheehy* v. *Mandeville*, 6 Cranch 253, said, at page 264 (italics ours):

> "That a note, without a special contract, would not, of itself, discharge the original cause of action, is not denied. *But it is insisted that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it. This principle appears to be well settled. The note of one of the parties, or a third person, may, by agreement, be received in payment.* • • • Since, then, the plaintiff has not taken issue on the averment that the note was given and received in discharge of the account, but has demurred to the plea, that fact is admitted; and, being admitted, it bars the action for the goods."

Although criticized in *Mason* v. *Eldred*, 6 Wall. 231, at pages 238-239, as to another point decided, the principles laid down in the above quotations have not, we believe, ever been questioned.

A case which is in principle a perfect analogy to the instant case is *Central Trust Company* v. *Richmond, N., I. & B. R. Co.* (C. C. A., 1895), 68 Fed. 90; certiorari denied, 163 U. S. 679.

In that case, a contract had been made between the parties, by which one company agreed to construct a railroad and to receive payment therefor in bonds. These bonds were given in part, and the question was whether the construction company had a mechanic's lien for the work done by it. In deciding the case, Judge Lurton, afterwards a Justice of this Court, said at page 94:

> "It may be admitted that lien laws do not, in general, create a lien in favor of one who accepts in full a different security at the time the contract or agreement is made, or who has entered into any other agreement which manifestly indicates a clear purpose and intention to waive the benefit of the statutory lien."

To the same effect is:

> *Ohio Falls, etc. Co.* v. *Central Trust Co.* (C. C. A. 6, 1895), 71 Fed. 916.

Finally, the same principle has been approved and settled by the decision of this Court in the case of *McMurray* v. *Brown*, 91 U. S. 257. In that case a contractor contracted to furnish materials and construct a building, and to receive payment in part in cash, in part by the conveyance of a specified piece of real estate and in part in promissory notes. The Court held that the contractor was entitled to his lien on the refusal of the owner of the lot to convey it, or in lieu thereof, to pay for the material used in the construction of the building. Mr. Justice Clifford delivered the opinion of the Court and said at pages 265 to 266 (italics ours):

> *"Cases may arise, undoubtedly, where the rights and responsibilities of the parties are so completely*

> ***defined by the contract, that neither party is at liberty to claim any thing beyond the terms of the contract, if the contract is in all respects fulfilled.*** Consequently, lien laws do not in general create a lien in favor of a material-man who has accepted in full a different security at the time the contract or agreement was made * * *."

It is the settled law that when a note of a third party, or what is equivalent thereto, a note endorsed by a third party, is to be given as part of the payment of the consideration under an original agreement for goods or services, the note itself is the payment called for. And when that is given there ceases to be any claim under the original agreement, which has been fully performed (as to such feature), by the giving of the note.

Taylor v. *The Commonwealth*, Fed. Cas. No. 13,787;

Youngs v. *Stahelin*, 34 N. Y. 258, 265 (cited with approval by the C. C. A. for the 2nd Circuit in *Atlas* v. *Columbian*, 102 Fed. 360);

Whitbeck v. *Van Ness*, 11 Johns (N. Y.), 409, 409, 412, 414, 415;

Phelps v. *Camilla*, Taney's cases, 400;

Murray v. *Lazarus*, 1 Paine 572, 577;

Noel v. *Murray*, 13 N. Y. 167, 171, 172;

Manning v. *Lyon*, 70 Hun. 345;

Segrist v. *Crabtree*, 131 U. S. 287, 289;

Sheehy v. *Mandeville*, 10 U. S. (6 Cranch), 253, 264.

Decisions of this Court relied on by Petitioner.

The petitioner relies in its brief on three cases:

> *The Kimball*, 3 Wall. 37, 45;
> *The Bird of Paradise*, 5 Wall. 545, 561;
> *The Emily Souder*, 17 Wall. 666, 670, Petitioner's brief, pp. 8-9.

These cases are all distinguishable from the case at bar.

In *The Kimball*, 3 Wall. 37, a note had been given but there was no contract and the note was given for a pre-existing debt. The lien in that case was for freight. That was a type of lien favored by the Court. It was found there was nothing in the charter party there considered inconsistent with the intention to retain the lien. The language of the opinion quoted at page 8 of the petitioner's brief recognizes in the italicized part of the quotation that a promissory note will discharge a debt if "*such be the express agreement of the parties.*"

The Circuit Court of Appeals adequately discloses the distinction between the present case and *The Bird of Paradise*, 5 Wall. 545.

Judge Manton said (R. 33):

> "In *The Bird of Paradise*, 5 Wall. 545, 18 L. Ed. 662, referred to by appellant, a lien was asserted for freight. That lien differs from a maritime lien for repairs because a ship is bound to the cargo until delivery or tender of delivery and equally is the cargo bound to the ship for the payment of freight. The freight contract provided that it should be paid in Liverpool on unloading and right delivery of the cargo. Construing the clauses of the bill of lading together, it was clear that the charterer was not

obliged to pay the freight until tender of delivery. While the charterer did give the first acceptance, he failed in business, and the acceptance was dishonored before the arrival of the ship, and he never gave or tendered the second acceptance mentioned in the charter party. It was held that the lien remained. The Court stated that the freight lien 'stands upon the same ground with the lien of the carrier on land, and arises from the right of the shipowner to retain the possession of the goods until the freight is paid, and is lost by an unconditional delivery to the consignee'. And that the freight lien 'may be modified, or it may be excluded, or displaced by direct words, or by the insertion of some stipulation wholly incompatible or irreconcilable with the existence of such a right.' Requiring the appellee to procure indorsements of three separate individuals was such a stipulation as is referred to in the language quoted, and the appellant relied solely upon the indorsements and not on the maritime lien, for it refused to sell until it had the agreed indorsements."

The facts in *The Emily Souder*, 17 Wall. 666, were as follows:

A steamer was compelled to put into a small South American port for repairs. Her captain was without funds or credit. Her owners were unknown there and also without credit. The captain and the United States consul had to apply to several firms before finding one willing to furnish supplies, repairs and other necessaries needed and to advance necessary funds. Thirty day drafts on the owners for the price of the necessaries and advances were given by the captain. These were accepted by the owners but later dishonored. The creditor interests claimed a lien on the ship.

The libellants asserted that the advances "were made on the credit of the vessel, and would not have been made on any other condition; but that the drafts were taken only as conditional payment, and not in satisfaction of the sums advanced."

The captain testified that the advances were made on the credit of the owners of the vessel and upon drafts on them, nothing being said at the time about bottomry on the vessel or raising any money on her credit.

This Court in its opinion recognized the rule applied by the Circuit Court of Appeals in the instant case.

Mr. Justice Field said, 7 Wall at page 670 (Italics ours):

> "The drafts given by the captain upon the owners of the vessel in New York were not received by the libelants in discharge and satisfaction of the sums advanced. They were received only as conditional payment. Such would be the presumption of the law in the absence of any direct evidence on the point. For by the general commercial law of the world, a promise to pay, whether in the form of notes or bills, is not of itself the equivalent of payment: it is treated everywhere, *in the absence of express agreement or local* usage to the contrary, as conditional payment only. On principle, nothing can be payment in fact except what is in truth such, unless specially agreed to be taken as its equivalent."

After adverting to the rule that there was presumptively a lien on a vessel for supplies furnished in a foreign port, the Court in that case as the Court did in the instant case, examined the circumstances in order to ascertain the intentions of the parties. There was no express contract in the Souder case made by the owners indicative of their intention, and the fact that the Court was unable to find

from the mere circumstance that the captain gave and the suppliers accepted drafts on the owner, an intention to waive the right to a lien does not conflict in any way with the decision below which held on the facts that the lien was waived.

The Court in the *Emily Souder* found the evidence direct and positive that the drafts were taken as conditional payment only.

In this case the contract was found to be direct and positive that the drafts were to be taken as absolute payment. The absence of an agreement with the owner in the Souder case alone constitutes a significant distinction.

The decision in the instant case below, therefore does not present any rule contrary to the applicable decisions of this Court relative to the effect of an agreement to take a note in payment for goods.

Indeed the decision in the instant case is entirely in accord with the long line of decisions in this Court above mentioned on this question.

Alleged conflicts with Circuit Courts of Appeal.

The petitioner's brief concludes with allegations of conflicts with certain decisions of other Circuit Courts of Appeal. In what respects the conflicts exist is not clearly stated.

Inasmuch as the only question presented by the decision below is a question of fact, it is difficult to see how it can conflict with applicable decisions of other Circuit Courts of Appeal on matters of law.

The first conflict is declared to be with the decision of the Circuit Court of Appeals of the Eighth Circuit in *A.*

Leschen & Sons Rope Co. v. *Mayflower G. M. & R. Co.*, 173 Fed. 855. In that case a mining company purchased rope on a conditional sale contract which recited "to be paid for by your note". The mining company gave the note and later defaulted in payment. The rope company repudiated the note and replevied the rope. The mining company contended that the giving of the note constituted payment.

That opinion exhaustively sets forth the principles necessarily to be regarded in the construction of a contract wherein there are conflicting terms. Many of the principles stated in that opinion are applicable to this case, for in this case as in that the intention of the parties controls. That opinion emphasizes necessity of determining such cases on the facts. The opinion clearly declares that, even as to a mechanic's lien, the existence of the lien depends on the intention of the parties as expressed in the contract and as shown by the circumstances of the case.

Why the Court found differently in that case is apparent from a glance at the facts. In that case a purpose to retain the lien was evidenced from the outset by retention of title in the conditional sale contract. That provision of the contract alone was evidence of intention sufficient to counter-balance the provision that the note should constitute payment. The terms of the contract were inconsistent. The lower courts in our case pursued the same steps as the Court in the Eighth Circuit but found that there was no scrap of evidence that the parties intended to retain the lien. The Circuit Court of Appeals for the Eighth Circuit recognized that it was dealing with a contract of inconsistent terms. Here the terms of the contract are clear and uncontroverted by any evidence. The binding effect of clear terms of contracts such as the one here considered is remarked in that decision. The opinion declares (p. 857):

> "The intention of the parties, when manifest, or when ascertained from the written agreement, must control and be enforced, without regard to inapt expressions or the dry words of the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement."

If, as the petitioner contends, it is unreasonable to find that he did not rely on the credit of the ship, that intention cannot be enforced because directly contrary to the plain sense of the binding words of the agreement. Certainly the petitioner cannot contend that there is anything in the contract indicative of an intention to retain the lien.

The next decision alleged to be in conflict is *El Amigo*, 285 Fed. 868. There the City of Houston had taken a bond from one Miller, who operated a string of vessels, conditioned on the payment of all charges accruing in favor of the City from the ships operated by him. Subsequently certain charges accrued to the City and it claimed a maritime lien. The Court found "the terms of the bond do not indicate that the acceptance of it was intended to have the effect of waiving, releasing or discharging any lien the City might acquire. There was no evidence that the City consented to give up its lien or that the bond was accepted in lieu of claims which might arise in the City's favor for wharfage, etc." The bond was a general bond required of all persons contracting with the City. There was no contract indicative of the intention of parties. The bond was not payment itself, in fact it was conditioned on the failure of payment in the ordinary course. The difference in facts between that case and the instant case explains the difference in the findings of the two courts. Both applied similar principles and gave the same effect to the Merchant Marine Act.

Under the facts as shown here and in view of these authorities, it is submitted, that there was not any maritime lien on the S.S. *President Arthur*, on which a proceeding *in rem* must be based, because the libellant had been paid in full in accordance with his contract.

LAST POINT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED WITH COSTS TO THE RESPONDENT.

Respectfully submitted,

JOHN M. WOOLSEY,
SAMUEL D. STEIN,
SAUL S. MYERS,
Of Counsel.

New York, February, 1929.

SUPREME COURT OF THE UNITED STATES.

No. 272.—October Term, 1928.

W. A. Marshall & Co., Inc., Petitioner, vs. Steamship "President Arthur," her Engines, Boilers, etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 20, 1929.]

Mr. Justice Sanford delivered the opinion of the Court.

In May, 1925, W. A. Marshall & Co., Inc., filed a libel in admiralty in the federal District Court for Southern New York against the Steamship "President Arthur," asserting a maritime lien thereon for an unpaid balance of the purchase price of bunker coal furnished by it on the request of the owner to and for the use of the steamship. The owner, the American Palestine Line, Inc., answered as claimant, denying that the Company had a lien on the steamship and alleging that the entire purchase price had been paid in accordance with the contract of sale.

At the hearing the District Court held, on the evidence, that the Company had no lien on the vessel, and dismissed the libel. 22 F. (2d) 584. This decree was affirmed by the Circuit Court of Appeals. 25 F. (2d) 648.

The evidence—which is undisputed—shows that when the negotiations were entered into for the coal the Line wished to pay for it on longer terms than were usually granted, and that the Company, after investigating the standing of the Line, not believing that it was financially responsible, and wanting additional security, required the Line to give trade acceptances endorsed by responsible and acceptable persons; with the purpose that, if needed at any time, the money could be obtained by discounting the acceptances, thus endorsed, prior to their maturity.

Thereupon, in February and March, 1925, the parties entered into two written contracts for the coal. Each of these provided that the Company should sell and the Line, as owner of the steam-

ship, should buy, at a specified price, a designated amount of coal "to be used as bunker coal for" the steamship, and to be delivered on specified dates. Each provided that the Line should "pay for the said coal as follows: By delivering" to the Company two trade acceptances, dated the date of the delivery of the coal, due March 10 and May 8, respectively, and "endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb." Neither contract referred to any lien on the vessel; and each recited that "The entire contract between the parties is stated above and there is no outside condition, warranty, agreement, or understanding." At the foot of each contract the persons named as endorsers also signed an agreement reciting that "In consideration of the execution of the foregoing contract" and the delivery of the coal to the Line and of one dollar, they jointly and severally agreed to endorse the trade acceptances described in the contract.

Without the consideration of such endorsements, it was shown, the Company would not have sold the Line the coal.

The coal called for by the contracts was delivered to the steamship. The purchase price amounted to $21,736.16. For this the Line gave the Company its two trade acceptances endorsed by the three designated persons; these being consolidations of the four acceptances required by the two contracts. The acceptance for $11,794.54, first maturing, was duly paid. The acceptance for $9,382.62, maturing later, was not paid and was protested. This was the amount of the balance for which the Company claimed a lien.

After filing the libel, the Company also brought a civil action upon the unpaid acceptance in a state court, against the endorsers only. This is still pending and undetermined.

The questions presented here are: whether under the contracts the Company waived the maritime lien which it would otherwise have had on the steamship to secure the payment of the purchase price; and, if not, whether the delivery of the endorsed acceptances constituted under the contracts payments of the purchase price which extinguished the lien.

1. As to the first of these questions it is necessary to consider the provisions of the Maritime Lien Act of 1910,[1] relating to liens for necessaries, which were reenacted in the Ship Mortgage Act of

[1] 36 Stat. 604, c. 373.

1920.[2] Subsec. P of the latter Act provides that: "Any person furnishing repairs, supplies . . . or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel." Subsec. S provides that: "Nothing in this section shall be construed to prevent the furnisher of repairs, supplies . . . or other necessaries . . . from waiving his right to a lien . . . at any time, by agreement or otherwise. . . ."[3]

Prior to the Act of 1910 it had been settled that by the maritime law as administered in this country a lien was given for necessaries furnished a vessel in a port of a foreign country or state upon the credit of such vessel; but that no such lien was given for necessaries furnished in the home port or state. *The Roanoke*, 189 U. S. 185, 193.

The purpose of the Act of 1910, as shown by the Reports of the Committees of Congress, was to do away with this "artificial distinction" and "the doctrine that, when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence, no lien arises"; and "to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and necessaries". *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 11.

To this end the Act gave a maritime lien on any vessel, whether foreign or domestic, for necessaries furnished on the order of the owner or his authorized agent, and relieved the libellant from the necessity of alleging or proving that credit was given to the vessel. The Committee reports show, however, that it was not intended to make any other change in the general principles of the existing law of maritime liens, *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, *supra*, p. 11; and the specific provision that the Act should not be construed as preventing the furnisher of the necessaries from waiving his right to a lien, "by agreement or otherwise,"

[2]This is the separate designation of sec. 30 of the Merchant Marine Act of 1920, 41 Stat. 988, 1000, c. 250.

[3]U. S. C., Tit. 46, §§ 971, 974.

indicates clearly, we think, that it was not intended to change the principles of the maritime law in respect thereto. That an express renunciation of the lien is not essential, is plain.

We need not enter here into the general field of the waiver of maritime liens. Such liens differ in their character and are not equally favored—the lien for necessaries, which is a secret one, being *strieti juris*, *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, *supra*, 12. It suffices to say that we think the principles applicable to the question whether the lien was waived by the contracts entered into here, are aptly indicated in the following cases, which, in the main, were analogous in their facts to the present case, and were decided by members of this Court, sitting at circuit.

In *Murray* v. *Lazarus*, 1 Paine 572, 17 Fed. Cas. 1049, 1051 (1826), the libellants made a special agreement with the master for the payment of their advances for repairs and supplies furnished the vessel in a foreign port, and took from him a bill of exchange drawn upon the agents of the owner. Thompson, Circuit Justice, in holding that the libellants had no lien for these advances on the freight monies received by the owners, said: "When an express contract has been entered into for the payment of such expenses, that must be resorted to, and will be considered a waiver of such implied lien if any existed. And a party who has waived his right in this respect cannot be permitted, at a subsequent time, and under a change of circumstances to reinstate himself in his former condition to the injury of others . . . If this is to be considered a regular and ordinary bill of exchange, it was a substitution for any lien that might have existed, and must be considered a relinquishment thereof."

In *Phelps* v. *The Camilla*, Taney, 400, 19 Fed. Cas. 441, 445 (1838), the libellants furnished the agents of the vessel in a foreign port copper which was used in repairing the vessel. The sale was made on a written order of the agents that made no mention of the vessel or her owners. The copper was charged to the agents, and they gave the libellants their negotiable note, which was not paid. The libellants claimed that the charge to the agents had been made by mistake, and some months later changed the account on their books and charged the copper to the ship and her owners. Taney, Circuit Justice, finding upon the evidence that the copper was sold to the agents upon their personal credit and was

not furnished upon the credit of the brig and her owners, held that the libellants had no lien, but added: "It must not, however, be understood, that the decision would be different, if the copper had been originally charged to The Camilla and her owners. It is true, that upon such a sale, the libellants would, in the first instance, have acquired a lien upon the brig; but that lien, in my opinion, would have been waived by taking afterwards the note of (the agents). . . If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue."

In *Leland* v. *Medora*, 2 Woodb. & M. 92, 15 Fed. Cas. 298, 299 (1846), Woodbury, Circuit Justice, speaking of the lien for repairs on a vessel, said that "if the evidence . . . shows, that the ship was not relied on originally, though foreign, but the master or owners or other security were, the lien does not attach any where, or under any form. The Maitland, 2 Hagg. Adm. 253; The Nestor [supra.]"

In *The Ann C. Pratt*, 1 Curt. 340, 1 Fed. Cas. 947, 950 (1853), Curtis, Circuit Justice, in holding that there was no maritime lien for advances to the master of the vessel in a foreign port to make necessary repairs that had been secured by a void bottomry bond, said, citing *The Nestor* and other cases, "that the lien created by the maritime law may be, and is, waived by the creditor, by any act or contract which is inconsistent with an intention to receive or retain that lien." The decree in this case was affirmed in *Carrington* v. *Pratt*, 18 How. 63, 68, in which this Court said that "it is well settled that the lien implied by the general admiralty law, may be waived by the express contract of the parties, or by necessary implication; and the implication arises in all cases where the express contract is inconsistent with an intention to rely upon the lien. A familiar instance is where the money is advanced or repairs made, looking solely to the personal responsibility of the owner or master."

In *Taylor* v. *The Commonwealth*, 23 Fed. Cas. 756, 757 (1875), the libellant, before making repairs on the vessel at her home port, had entered into a written contract specifying that they were to be paid for partly in cash and partly in endorsed notes, that is, negotiable notes, with personal security. Miller, Circuit Justice, in holding that under these circumstances there was no lien on the vessel for the repairs, said: "I have no doubt of the fact that a man doing that kind of work may rely on the owner of the vessel, and that if he makes no specific contract on the subject, he will have a right against the owner and the vessel . . . ; but that is a lien which the law implies from the circumstances, and if a specific contract is made which shows that the party relied upon other security and other modes of payment, then he cannot enforce the admiralty lien. It is very clear to me, here, that (the libellant) in making this contract, never intended to rely on the security of the vessel itself, because he made this contract for the very best kind of other payment. . . . I think, having made an express contract for an express security, he cannot say, 'I did this work on the credit of the vessel.' In other words, I think if there is any question of admiralty lien, that it must have been the intention in the mind of the party who furnishes the supplies and repairs whether in a home or foreign port, to rely on the credit of the vessel. . . . If it can be shown that he did not rely on that alone, and that he intended to rely on other security, which he supposed sufficient, or which was supposed to be better, then he had no lien, because the lien arises from implication, from the fact expressed or implied that the man in furnishing the supplies or contracting a debt, relied on the vessel as security, and if he relied on anything else it is another security sufficient, or supposed to be, which, in case that turned out to be insufficient, does not restore his lien."

In the present case the libellant, being unwilling to sell the coal to the owner for the use of the vessel without personal security for the payment of the purchase price, before furnishing the coal made contracts which specifically provided that the owner should "pay for" the coal at the time of its delivery by trade acceptances endorsed by three designated persons, who in consideration for the contracts agreed to endorse the acceptances. Neither of the contracts provided for any lien upon the vessel;

and each, on the contrary, specifically recited that it stated the entire contract between the parties and that there was no outside agreement or understanding. Furthermore, upon the delivery of the coal, the libellant accepted the trade acceptances endorsed by the designated persons, and when it filed the libel against the vessel still retained the unpaid acceptance, on which later it brought suit against the endorsers.

Applying the principles stated in the foregoing cases, we think that the libellant, having made specific contracts for an express security, instead of resting on the lien which the law would otherwise give, must rely on the contracts it made for itself, and cannot now, in a change of circumstances, resort to the lien it would have had in the absence of the special agreements; and that by taking other and different security, upon which it relied, and which it still retains, without stipulating for the retention of the lien, it has waived the lien which it otherwise would have had.

2. Holding that the lien was waived, it becomes unnecessary to determine whether the deliveries of the endorsed acceptances constituted under the contracts payments of the purchase price which would have extinguished the lien.

The decree is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.